the said defendant, Edward S. Dreyer, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.

It is further ordered that the said defendant pay all the costs of these proceedings, and that execution issue therefor." (21, 22.)

THE EVIDENCE.

The evidence taken upon the trial discloses that; on March 13, 1894, defendant was first elected treasurer of the West Chicago Park Commissioners for the ensuing year. (57)

On December 18, 1894, he was re-elected treasurer for the ensuing year. (58)

On December 30, 1895, he was re-elected treasurer for the ensuing year (59), and on December 21, 1896, the following action of the Park was recorded on the minutes of the commissioners:

"That inasmuch as checks drawn on the treasurer have been returned not paid, Resolved, that the resignation of Dreyer as treasurer be accepted, and the office declared vacant. Carried." (62)

The West Chicago Park Commissioners are a body corporate, organized under the special act of 1869 (1 Private Laws of Illinois, 1869, p. 343), entitled,

"An act to amend the charter of the City of Chicago to create a board of park commissioners, and authorize a tax in the Town of West Chicago, and for other purposes,"

and the amendments thereto.

By virtue of successive acts, authorizing large issues of bonds and empowering the board of park commissioners to increase the bond of the treasurer, Dreyer's bond was fixed at $500,000. (75)

The commissioners, pursuant to the authority of the provisions of the act of 1869, prescribed the duties of the treasurer as follows:

"Article 2. Committees. Section 1: There shall be a finance committee composed of three members. It shall have general supervision of the finances of the board, and shall pass upon the financial reports of all officers.

The treasurer shall act as financial agent of the board for the receipt and distribution of its funds. He shall keep the moneys paid to him for and on account of the board, *and the deposit account wherever kept, shall be in the name of the board.* He shall sign all checks drawn by him for account of the board. He shall see that the books of account are kept in proper form, and correctly, and will in all cases at once, upon his discovering any delinquencies in the account of any of the officers of the board, report the same in writing with the name of the delinquent to the board.

Section 2. He shall pay all orders signed by the secretary and countersigned by the auditor, and he shall pay no order that has not been so signed and countersigned.

Section 3. He shall cause all vouchers paid by him to be filed and properly preserved. He shall file with the secretary on or before the 5th day of each and ever month a detailed statement of the receipts and disbursements of the board for the preceding month, and his books and papers shall at all times be open to the inspection of any member of the board." (54, 55, 56.)

During the time Dreyer was treasurer of the West Park board there was in force in the State of Illinois an act, passed in 1893 (Session Laws of Illinois, 1893, p. 136), entitled:

"An act to compel state, county, city, township, school and park treasurers and other custodians of public

funds to account for interest on such funds, under their control."

This act provided:

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the state treasurer and every county, city, township, school and park treasurer, and every other custodian of public funds who shall be hereafter elected or appointed and qualified, *shall, at the end of each fiscal year,* **account for interest on the daily balances of the funds from time to time in his custody, at a rate of not less than two per cent. per annum, and as much higher as solvent banks that are reasonably accessible pay on the daily balances of accounts that are subject to sight draft or check.** *from time to time in his custody,* at a rate o*f not less than two per cent.* per annum, and *as much higher* as solvent banks that are reasonably accessible *pay on the daily balances of accounts that are subject to sight draft or check.* Three-fourths of such interest shall belong to the public and be added to the fund; and the remaining one-fourth of such interest shall belong to such treasurer or custodian, and may be retained by him as extra compensation for the extra care and responsibility assumed in making the fund bear interest; PROVIDED, that nothing herein contained shall be so construed as to in any way release such treasurer or custodian or his bondsmen from any liability. AND, PROVIDED, FUTHER, that if any such treasurer or custodian shall keep such funds or any part thereof in his personal possession *and not in a bank or on deposit for the purpose of receiving interest* on the same and keep the same in actual money and not in securities, *and shall not in any way use such funds or any part thereof himself* or receive any interest or thing of value or compensation for the use of said funds, or permit them to be used by any person, persons, copartnership or corporation, for his benefit, then he shall not be required to account for any interest on the funds so kept, providing no responsible depository accessible shall be willing to pay interest, and in that case he shall make, sign and file an affidavit in the following form: * * *."

For more than seventeen years prior to his becoming

treasurer, Dreyer was in the general banking and real estate brokerage business in the City of Chicago, in partnership with one Robert Berger, under the name of E. S. Dreyer & Co. (293) Their business was extensive and the business operations of the firm with their customers filled four immense customers' ledgers, which were exhibited to the jury upon the trial of said case. (126)

From the moment of Dreyer's first appointment, all funds of the West Park Commissioners were deposited with said firm of E. S. Dreyer & Co., in an account kept in the books of said bank under the title, "West Chicago Park Commissioners" (134); and none of said moneys ever went to the individual account or use of the defendant. (309)

The various deposits making up the money in question were made by the secretary of the board with E. S. Dreyer & Co., the secretary brought such deposits to Dreyer & Co.'s bank, with a deposit book entitled, "George F. Talty, Secretary, in account with bank of E. S. Dreyer &. Co." (178); and a deposit slip already prepared and entitled: "Deposited with E. S. Dreyer & Co., Bankers, corner of Washington and Dearborn streets, for account of West Chicago Park Commissioners."

In this way, from the time of defendant's first appointment up to December 21, 1896, there were deposited with E. S. Dreyer & Co. to that account various sums of money aggregating millions of dollars. (131, 132, 224, *et seq.*)

All of these moneys so deposited were properly paid out and accounted for during the entire period during which defendant was treasurer up to December 21, 1896, upon which day Dreyer was (admittedly) indebted

to the West Park Board for the balance of the various deposits in the sum of $316,013.40. (129)

Dreyer, during all the time he was treasurer, was under bonds to faithfully perform his duties and to account for all moneys which from time to time came into his hands as treasurer, each of which bonds were in the penal sum of $500,000. (74, 5.) There were three separate bonds given to cover his three terms of office; the last of which was given on January 14, 1896, and upon each of said bonds as surety appeared the name of George Schneider, among others. Mr. Schneider scheduled *over* $300,000 of property upon said bonds. (74) Mr. Schneider *was the father-in-law of Dreyer's partner*, Robert Berger. (296)

Mr. Schneider *was president of the National Bank of Illinois*, which was one of the most influential financial institutions in the City of Chicago, and its reputation "was at that time (December 21, 1896) as to solvency first-class. I never heard it questioned." (249, 250, 251 *et seq.*)

While Dreyer was treasurer, *Carl Moll was the president of the West Park Board and the cashier of the National Bank of Illinois.* (295, 296.)

During all the time Dreyer was treasurer, and for more than fifteen years prior thereto, all the moneys of E. S. Dreyer & Co., except a small amount of cash (for current use) was kept in the National Bank of Illinois (173, 4), and "*all the checks of the West Park Board were honored by the National Bank of Illinois, whether E. S. Dreyer & Co. were overdrawn or not. These payments* were in *large amounts. During the last ninety days we paid out over* $200,000 *for the West Park Board.*" (171)

The evidence disclosed that the

"*drafts of E. S. Dreyer & Co. were paid by the National Bank of Illinois at all times when the account of E. S. Dreyer & Co was overdrawn in the National Bank of Illinois, * * * and that continued until the National Bank of Illinois failed. The National Bank of Illinois had done this for seventeen years.*" (117, 171.)

Every dollar which had come into the hands of the treasurer or E. S. Dreyer & Co. from said West Park Board *was deposited in the National Bank of Illinois.* (170)

And to the extent of many hundreds of thousands of dollars the park moneys went direct to the National Bank of Illinois without ever passing through Dreyer & Co.'s bank at all except to credit the various sums to the West Park account on Dreyer & Co.'s books. (139)

The secretary of the West Park Board testified that the West Park Board received interest for the moneys in the hands of the treasurer for the year 1894 to the amount of $3,529.05; for the year 1895, $3,405.02; for the year 1896, $4,251.06 (being part of the moneys in question.) (100)

On December 21, 1896, under the order of the comptroller of the currency, a receiver was appointed of the National Bank of Illinois. (192) And at that time (defendant offered to prove that) there was over $3,000,000 in actual cash in the vaults of the National Bank of Illinois. (193) The failure of the National Bank of Illinois *caused the appointment of a receiver of E. S. Dreyer & Co* upon the same day. (309, 310.)

The entire transaction between Dreyer and the National Bank of Illinois with reference to the West Park moneys was under an agreement, which appears from Dreyer's testimony to be that:

The reason he turned over the West Park moneys to the National Bank of Illinois was because the president and vice-president of the National Bank of Illinois told him to do so, and that they would honor all E. S. Dreyer & Co.'s checks on the West Park Board. (305, 306.)

The facts disclose that this agreement was at all times fulfilled and extended over a period of many years. (307)

The trial court would not permit the defendant to prove that the National Bank of Illinois had securities for and had agreed to pay over the West Park moneys whenever called for or payable, which was in law and in fact the same as if that money had actually been to the credit of E. S. Dreyer & Co.; and would not permit the defendant to show that the National Bank of Illinois had ten times the amount of money in question, in actual cash, in its vaults, and was therefore entirely capable of fulfilling its agreement to pay over this money; and that through no fault of Dreyer's a receiver was appointed by the comptroller of currency to take possession of all the assets, property and effects of the National Bank of Illinois. And had this not occurred the moneys would have been forthcoming to the West Park Board at the time the same were due and payable, *and they were payable nine days after the failure as Dreyer's term then expired* (58), or when demanded of the treasurer. These facts were embodied in the following offer tendered but refused:

"I want to prove that E. S. Dreyer & Co. kept their bank account with the National Bank of Illinois; that from time to time during the course of business, lasting through seventeen years and down to the time of its failure, Dreyer's bank account was overdrawn with the National Bank of Illinois; that to secure the National Bank of Illinois, Dreyer & Co. deposited collateral in the shape

of securities as well as the conveyance of large real estate holdings, to the bank; that that was upon the express agreement that the checks of Dreyer & Co. should always be paid; *and that when it came to the taking of the West Park Board account it was with the express understanding with Mr. Schneider and Mr. Hammond, vice-president and manager of the bank, that Dreyer having that security in their hands and having the West Park account deposited with them, they would pay every check drawn on that fund.* I also propose to prove that prior to the West Park Board account being in that bank in pursuance of that contract the National Bank of Illinois advanced to Dreyer & Co. over $1,000,000, and that under this agreement that bank paid every check and draft of the West Park Board down to the time that the receiver thereof was appointed. I also propose to prove that relying upon that agreement and acting under it Dreyer continued his account in that bank, putting in the West Park moneys with the entire account; that the National Bank of Illinois continued to perform the contract for which they had Dreyer's security down to the day possession was taken (a receiver was appointed for the National Bank of Illinois); *that the National Bank of Illinois had made the provision to pay these West Park moneys and had the security to do it.*" (297, 298.)

The demand for this money was made by Fred M. Blount on January 31, 1900 (114), more than three years after the failure of Dreyer & Co. and the National Bank of Illinois, and after the West Park Board had obtained a decree for these very moneys, based upon this very agreement and arrangement, which the court refused to allow the defendant to make proof of, and which decree the court would not admit in evidence (237), although the moneys were at the time of Dreyer's conviction set aside to pay that decree (294) and have long since been paid.

ERRORS RELIED UPON.

The errors assigned and relied upon in this court are the following:

"1. That on the trial of said cause in said criminal Court of Cook County and in the rendition of the judgment on said trial, and in the judgment of said Supreme Court upon the review of said judgment of said Criminal Court of Cook County, there was set up by your petitioner and drawn in question and decided adversely to your petitioner, that the trial of said suit in said Criminal Court of Cook County and the judgment therein rendered constituted a denial by said Criminal Court of Cook County, and by this honorable court, of a privilege and immunity claimed under the fourteenth amendment to the Constitution of the United States.

2. That from the record of said suit, herewith presented to your Honor, it will appear that your petitioner, Edward S. Dreyer, was twice placed in jeopardy for the same offense, contrary to the fourteenth amendment of the Constitution of the United States; that (379) that question was one of the questions passed upon in said Criminal Court of Cook County and by the Honorable Supreme Court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court, hereinafter more particularly set forth.

3. That from the record of said suit, it will appear that the officers in charge of the jury, when they retired to consider of their verdict, were not sworn in the manner, nor at the time prescribed by the statute of the State of Illinois, or by the common law, in contravention to the fourteenth amendment of the Constitution of the United States; that that question was one of the questions passed upon in said Criminal Court of Cook County and by the Honorable Supreme Court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court hereinafter more particularly set forth.

4. That from said record it will appear that the verdict of said jury in said Criminal Court of Cook County

was rendered under a statute of the State of Illinois, known as 'An Act to revise the law in relation to sentence and commitment of persons convicted of crime, and providing for a system of parol and to provide compensation for the officers of said system of parol,' approved April 21, 1899. That there was set up and preserved in said record, and decided adversely to your petitioner, that said statute is in contravention to the fourteenth amendment of the Constitution of the United States, as will more fully appear from the assignment of errors hereinafter more particularly set forth.

5. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as 'An Act in relation to the sentence of persons convicted of crime and providing for a system of parol, approved June 15, 1895, and in force July 1, 1895;' that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment to the Constitution of the United States.

6. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as 'An Act to create a state board of pardons and to regulate the manner of applying for pardons and commutations, approved June 5, 1897, and the amendment thereto;' that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment of the Constitution of the United States.

7. That from said record it will appear that the judgment under which your petitioner is held, so rendered as aforesaid in said Criminal Court of Cook County, and reviewed by this honorable court and reaffirmed by this honorable court, deprives your petitioner of his liberty without due process of law, and in contravention to the fourteenth amendment of the Constitution of the United States, and that that question was set up in said record and drawn in question and decided adversely to your petitioner; that such question was properly preserved in said record, and that (380) each and every of said questions hereinbefore set forth are fully and properly set up and preserved in said record. * * *" (381.)

BRIEF AND ARGUMENT.

Under such assignments of errors, three questions are before this court for its consideration.

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER THE CIRCUMSTANCES IN THE CASE AT BAR.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY, DIRECTING "THE WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE STATE BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFFENDANT WAS CONVICTED AND SENTENCED."

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

Section 5 of article2 (Bill of Rights) of the Constitution of the State of Illinois, of 1870, provides:

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate. * * *"

(Hurd's Rev. St. of Ill., p. 54.)

Section 6 of article 3 (Declaration of Rights) of the constitution of 1848, provides that:

"The right of trial by jury shall remain inviolate."

(Hurd's Rev. St. of Ill., p. 50.)

Section 6 of article 8 of the constitution of 1818 provides that:

"The right of trial by jury shall remain inviolate."

(Hurd's Rev. St. of Ill., p. 35.)

Section 8 of the Criminal Code of Illinois provides:

"All trials for criminal offenses shall be conducted according to the course of the common law, except where this act points out a different mode. * * *"

(Hurd's Rev. St. of Ill., p. 659.)

Section 1 of chapter 28 of the Statutes of the State of Illinois provides:

"That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law

prior to the fourth year of James the First * * * and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of force until repealed by legislative authority."

(Hurd's Rev. St. of Ill., p. 418.)

The Supreme Court of the State of Illinois has defined the term, "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," in the following manner:

"By the clauses of the constitution above cited the common law right to a trial by the jury in criminal cases is guaranteed and declared to be inviolate, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded. It is, however, said that the words '*as heretofore enjoyed*' *relate to those enjoyed at the time of the adoption of the constitution of* 1870. * * * The word '*heretofore*' as used evidently relates to the past, and in order to determine the true meaning of the words 'the right of trial by juries as heretofore enjoyed' *it is necessary to go back to the common law of England.* When this is done it will be found that the right of trial by jury constitutes certain specific things which cannot be dispensed with or disregarded on the trial of a person charged with a felony. * * * *If the language 'the right of trial by jury as heretofore enjoyed shall remain inviolate' shall be construed to mean that the system of trial by jury as it existed by statute at the time the constitution of* 1870 *was adopted was engrafted on and became a part of the constitution, as is contended, many embarrassing results never contemplated would follow.*"

George v. *People*, 167 Ill., 447.

Also in

Harris v. *People*, 128 Ill., 585.

Section 435 of the Criminal Code provides that:

"*When the jury retire to consider of their verdict,* in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted) unless by leave of court, *until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict, he will return them into court. Provided, in cases of misdemeanor only,* if the prosecutor for the people and the person on trial by himself or counsel *shall agree, which agreement shall be entered upon the minutes of the court,* to dispense with the attendance of any officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury."

That this section of the Criminal Code was plainly violated in the case at bar, and also the practice and procedure of the common law is indisputable.

The effect of the omission to swear the bailiffs, as provided by the Statute of the State of Illinois, its constitution and the common law, has been frequently passed upon in the courts of Illinois.

In *Jackson* v. *The People*, 36 Ill. App., 88, plaintiff in error was indicted for selling intoxicating liquors in less quantity than five gallons (a misdemeanor), in violation of the statute The question arose as to the legal effect of omitting to swear the officers placed in charge of the jury when they retired to consider their verdict. The jury having found the defendant guilty, the case was taken to the Appellate Court for the Fourth District. In passing upon the question the court said:

"The officer who was placed in charge of the jury when they retired to make up their verdict was not sworn as the statute requires. *This requirement of the statute cannot be dispensed with, even in misdemeanors, except by an agreement noted upon the minutes of the court.* See Sec. 495, Chap. 38, Starr & C. Stats. Ill., 866. *If it should be shown that no injurious results of this omission followed to the defendant, this will not cure the error.* **It was no part of the duty of the defendant to see that the officer was sworn, or to object to his taking charge of the jury until he was sworn.** It was the duty of the people to see that this was done, or that it was waived by an agreement entered on minutes of the court. The provision of the statute is clear, explicit and peremptory, and, until modified or repealed, its requirement cannot be dispensed with. *McIntyre* v. *People*, 38 Ill., 514; *Lewis* v. *People*, 44 Ill., 452."

In *McIntyre* v. *People*, 38 Ill., 514, an indictment for murder was found against the plaintiff in error. Before the retirement of the jury (which was in the evening), the officer in charge of the jury was not sworn, "otherwise *than at the noon adjournment on the same day* he had been sworn to keep the jury together under the order of the court." One of the grounds assigned for error in the Supreme Court (the defendant having been found guilty) was that "the court erred in placing the jury, while deliberating, in charge of an officer *not sworn in accordance with the statute.*" In passing upon that question the court said:

"We only propose in this case to determine whether the court below should have granted a new trial, *not on the evidence*, but alleged irregularities in the trial. The first question presented by the assignment of error is, *that the court below should have placed the jury in charge of a sworn officer of the court when they retired to deliberate upon their verdict.*

The 189th section of chapter entitled 'Criminal Jurisprudence' (R. S., 186) declares that 'when the jury shall retire to consider their verdict, in any criminal case

a constable or other officer shall be sworn or affirmed to attend the jury to some private, convenient place, and to the best of his ability keep them together, without meat or drink, water excepted, unless by leave of the court, until they shall have agreed upon their verdict; nor suffer others to speak to them, and that when they shall have agreed on their verdict, he will return them into court.' A subsequent clause, in the same section, provides that in case of misdemeanors, the prosecutor for the People and the person on trial, by himself or counsel, may agree, which agreement shall be entered on the minutes of the court, that the jury may reduce their verdict to writing and disperse upon delivering it, sealed up, to the clerk, and may also agree to dispense with the attendance of a sworn officer; and declares that the court may carry such agreement into effect and receive the verdict thus found.

The language of this section is explicit and peremptory, in the requirement that the jury when they retire to consider of their verdict shall be placed in charge of a sworn officer. **Nor, is there any exception, excepting in case of misdemeanor, where the parties, by agreement, may dispense with the requirement, and even in that case the agreement must not only be made but the court is required to enter it upon its minutes.** In the case of *Kinney* v. *The People*, 2 Gilm., 540, the court said that in capital cases the law indisputably is, that from (519) the commencement of the trial until the rendition of the verdict, the jury during all adjournments of the court should be placed in charge of an officer, unless it is otherwise ordered by the court on the consent of the accused and the attorney for the People.

The court in that case also say that it is not necessary that the record should show that an officer was sworn to take charge of the jury, but that it is the duty of the court to send a sworn officer of the jury, and if this duty is neglected, such facts should appear from a bill of exceptions. In this case it appears from the evidence embodied in the bill of exceptions that the officer having charge of the jury, at the time they retired to consider of their verdict, was not sworn. *It, however, appears that on an adjournment of the court at a previous time in the progress of the trial, the officer was sworn and charged by the court, but*

the oath required by the statute was not administered. The legislature has deemed this precaution essential to secure a fair and impartial trial; and it is a right secured to the accused, of *which he cannot be deprived by the court* or officers of the law. **And if the requirement is omitted without his consent, he may urge it for a reversal of a judgment of conviction.**
out his consent, he may urge it for a reversal of a judgment of conviction."

In *Lewis* v. *People*, 44 Ill., 452, the identical question was there again raised. It appears in that case from the statement of facts that "*defendant entered a motion for a new trial for the reason, among others, that the officer taking charge of the jury was not sworn as required by the statute. This ground was supported by affidavit of its truth.*" The court overruled the motion for a new trial and rendered judgment and sentenced the defendant to the penitentiary for four years. In passing upon the question the Court said:

"A motion was entered for a new trial, upon the ground, among others, that the jury, when trying the case, after hearing the evidence, retired to consider of their verdict, in charge of an officer who was not sworn *in the mode prescribed by the statute.* The motion was overruled and a judgment rendered on the verdict. The record discloses the fact that the officer in whose charge the jury were placed while deliberating on their verdict was not sworn, and this is the only error relied upon for a reversal.

The 189th section of the Criminal Code, R. S., 186, declares that, 'When the jury shall retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and, to the best of his ability, keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court.'

But it declares that, **in case of misdemeanor only,** if the prosecutor for the People and the accused shall by himself or counsel agree, which agreement shall be entered upon the minutes of the court, they may dispense with the attendance of an officer upon the jury.

The next section declares that if any officer sworn to attend upon a jury shall knowingly violate his oath or affirmation, or shall so negligently perform his duties that the jury shall separate without leave of the court, or obtain food or drink (except water), or if any person not belonging to the jury shall hold conversation with any of the jury, every person and officer so offending shall be punished for contempt of court by fine or imprisonment, or both, in the discretion of the court.

These provisions show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned, and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement.

The jury should be entirely free from all outside influences from the time they are impaneled until they return their verdict and it is accepted and they discharged; *and the legislature have determined that the provisions of this statute are necessary to accomplish the object.* It is a provision easily complied with, and one member of the court, at least, has never in practice seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power, short of its repeal, to dispense with this requirement. In case of *McIntyre* v. *The People*, 38 Ill., 514, it was held to be error in a case of felony to omit to swear the officer having charge of the jury.

For this error the judgment of the court below must be reversed and the cause remanded."

In *Sanders* v. *The People*, 124 Ill., 218, the defendant was on trial for perjury. On the adjournment of the court at noon the officer who took charge of the jury was sworn by the clerk *as required by the section of the*

statute above quoted. After the court met in the afternoon some further proceedings were had and the jury "retired to consider of their verdict," but the officer attending them *being the same officer in whose charge the jury were placed at the noon adjournment was not again sworn.* In reviewing that question the court said:

"The evidence shows that when the court adjourned at noon the officer who took charge of the jury was sworn by the clerk in the manner required by that section, but after the noon recess the jury returned into court, some further proceedings were had in the trial, the jury then retired to consider their verdict, but the officer who attended them was not again sworn. It would have been better if the officer had been sworn to attend the jury and keep them together and prevent others speaking to them, etc., at the time they retired to their consultation room to agree upon their verdict; *but if the statutory oath was administered to the same officer an hour or more before* they retired to the jury room, we do not regard this as such an irregularity as would justify a reversal. In *Lewis* v. *People*, 44th Ill., 452, it appears that the officer in whose charge the jury were placed while deliberating upon their verdict either was not sworn at all or was not sworn in the mode required by the statute. So also in *McIntyre* v. *The People*, 38th Ill., 514, it appeared that the oath required by the statute was not administered. In the case at bar, however, *such an oath* as the statue provides for was administered by the clerk to the officer in charge. The only peculiarity about it was that it was administered an hour or more before the jury retired, instead of being taken at the time or when they retired. In *McIntyre* v. *The People, supra*, the officer was sworn on adjournment of the court at a previous time in the progress of the trial, just as in the present case. But there the objection was only as to the character of the oath, and not as to the time when it was taken."

This case is an authority in favor of the contention made by the plaintiff in error, not only by the express ruling of the opinion, but also by reason of the

clear indication that even where the officers were sworn within one hour of the retirement of the jury, had the statutory oath not been administered the error would have been fatal. In the case at bar we have, even assuming all the facts as contended for in the affidavits presented by the state, the officers sworn for the last time on February 21, seven days before the jury retired to consider of their verdict, and upon a careful consideration of the affidavits, the fact clearly appears that the statutory oath was not administered, and that the only oath administered was given on February 20th, when there had been but four jurors accepted.

In *Farley* v. *The People*, 138 Ill., 97, the same principle is recognized by that court, wherein they say:

"It is now insisted that it was error to send the jury out a second time to deliberate upon their verdict, they having separated during the night. This error, we think, is well assigned. Under our statute, as at common law, the jury trying a defendant upon a charge of felony, upon retirement to consider of the verdict, must be placed in charge of a sworn officer whose duty it is to keep them together, to prevent others from speaking to them and not to speak to them himself, except to ask if they have agreed upon their verdict and when they have so agreed to return them into court. Section 435 of our Criminal Code (Rev. Stat., Chap. 38) is as follows: 'When the jury retire to consider of their verdict in any criminal case a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place and, to the best of his ability, keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court. Provided, in cases of misdemeanor *only*, if the prosecutor for the People and the person on trial, by himself or counsel, shall agree (which agreement shall be entered upon the minutes of

the court) to dispense with the attendance of an officer upon the jury or that the jury, when they have agreed upon their verdict, shall write and seal the same, and after delivering the same to the clerk may separate, it shall be lawful for the court to carry into effect any such agreement and receive any such verdict so delivered to the clerk as the lawful verdict of such jury ' ''

In *State* v. *McCormick*, 46 Pac. Rep., 777 (decided November 7, 1896, in Kansas), the court said:

"The bailiff who took charge of the jury when the cause was finally submitted was not sworn as the statute requires, and this is urged as a ground for a new trial. It appears that when the bailiff was originally appointed by the sheriff, the ordinary oath of office was administered to him and also before the commencement of the trial he was sworn, as follows:

'You do solemnly swear that you will support the Constitution of the United States and the Constitution of the State of Kansas, and faithfully discharge the duties of bailiff of this court, and not let the jury in this case depart or separate without the order of the court; so help you God.' No oath was administered to the bailiff *after the cause was submitted and before the jury retired for deliberation*. The oath that was administered fails to meet the requirements of the statute (Gen. St. 1889, Sec. 5305.) *The oath taken before the trial omitted the requirement to keep the jury together in a private and convenient place, without food*, except such as the court should order, and also that he should not permit any person to speak or communicate with them nor to do so himself. *These provisions were made to protect the jury from improper influences, and were deemed so necessary to the proper administration of the law that they were incorporated into the statute. The oath is important in its nature, and, being specifically required, cannot be disregarded.* For the reasons mentioned, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring."

In *Buxton* v. *The State*, 14 Southwestern, 480 (decided September 30, 1890, in Tennessee), the Supreme Court of Tennessee reversed that case upon the ground that the oath was not administered.

That this requirement is part of "due process of law" can also not be controverted.

This court as early as 1855 defined "due process of law" as contained in the Constitution of the United States and its amendments as follows:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by law of the land,' in Magna Charta. Lord Coke, in his commentary on those words, says they mean due process of law. * * * That the warrant now in question is legal process is not denied,* * * but is it 'due process of law?' The constitution contains no description of those processes which it was intended to allow or forbid. * * * To what principles then are we to resort to ascertain whether this process enacted by Congress is due process? * * * We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so **we must look to those settled usages and modes of proceeding existing in the common and statute law of England,** before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * *"

Murray's Lessee et al. v. *Hoboken Land & Imp. Co.*, 18 How., 272, 276, 277.

In *Thompson* v. *Utah*, 170 U. S., 343, 347, *et seq.*, this court passed upon the meaning and effect of the words, "trial by jury," as contained in the Constitution of the United States as follows:

"As the guarantee of a trial by jury, in the third article (of the Constitution), implied by a trial in that mode and **according to the settled rules of the common law,** the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were. * * *

"Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions

apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the sixth amendment is a jury constituted *as it was at common law*, of twelve persons, neither more nor less. (2 Hale's P. C., 161; 1 Chitty's Cr. Law, 505.) *This question must be answered in the affirmative.* When the *Magna Charta declared that no freeman should be deprived of life, etc.*, 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them *this great privilege* 'as their birthright and inheritance, **as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."**

That under the trial by jury at common law the same procedure with reference to the swearing of the bailiffs or officers to take charge of the jury was in force as prescribed by statute of the State of Illinois cannot seriously be disputed. In Chitty's Criminal Law, Vol. 1 (star paging 632), the author says:

"When the judge has thus summed up the evidence, he leaves it to the jury to consider their verdict. If they cannot agree in a short time, by consulting in their box, they retire to a convenient place appointed for that purpose, **and the bailiff is sworn to keep** them as follows: 'You shall swear that you shall keep this jury without meat, drink, fire or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed. So help you God.' This oath of the bailiff comprises, in a great degree, the duties of the jury when they are withdrawn."

See, also,

Dalt C., 185; 2 Hale, 296; Deck Sess., 223, and Bac. Abr. Juries G.

The Supreme Court of Illinois, however, in passing upon this question, in the case at bar said:

"Affidavits made by the bailiffs themselves, and by an assistant of the prosecuting attorn y, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28, so that even by the proof made on behalf of the People the only oath taken, by the bailiffs was some six days prior to their retirement with the jury and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the staute that 'when the jury shall retire to consider their verdict,' etc., 'a constable or other officer shall be sworn,' etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—**would be less than farcical.**" (371.)

Notwithstanding the above ruling, that court held that the defendant, by not then and there objecting to the jury being placed in charge of officers not sworn as prescribed by the statute and common law, waived that privilege. (374.)

In support of this proposition the Supreme Court of Illinois cited the following authorities:

Reins v. *People*, 30 Ill., 256.
McKinney v. *People*, 2 Gilm., 540.
Holmes v. *People*, 5 Gilm., 478.
Atterbury v. *State*, 56 Ark., 515.
State v. *Frier*, 118 Mo., 650.
United States v. *Ball*, 163 U. S., 662.
People v. *Johnson*, 110 N. Y., 134.

The cases thus relied upon are three cases from Illinois, one from Arkansas, one from Missouri, one decided by the Supreme Court of the United States, and one from New York.

The Illinois cases are:

Reins v. *People*, where there was an express consent and waiver of any irregularity, and concerning which case, as stated in *Farley* v. *People* 138 Ill., 97, at page 102, the decision of the question in that case is not an adjudication upon the effect of the omission in the case at bar.

McKinney v. *People*, in which the question of waiver could not arise, because, as the record there stood, the Supreme Court stated that it would presume that the jury were in charge of sworn officers, inasmuch as the bill of exceptions and record were silent as to that fact.

Holmes v. *People*, a case in which the question is given no consideration, and again where the record did not disclose the fact that the officers were not sworn, and the court there properly inferred that they were sworn, hence the question of waiver could not possibly arise.

As to the cases cited from other states:

State v. *Frier* is decided under the Missouri statute, which is not mandatory, and contains a provision that the jury "may retire under charge of an officer."

U. S. v. *Ball*—Decided independent of any statute, or common law practice, and for the reason that the jury were in charge of a marshal's deputy sworn to perform his duties, etc.

People v. *Johnson*—Decided by reason of an express consent of the prisoner to allow the jury to view the premises where the crime is alleged to have been committed, and for the reasons stated in the excerpt of the opinion hereinbefore quoted.

As against these authorities we have a number of authorities positively affirming and reaffirming the law of the State of Illinois that "*we know of no power short of its repeal to dispense with this requirement*" of the statute.

That the omission here complained of cannot be waived, either by express consent or by a consent implied by lack of objection and exception must be admitted.

McIntyre v. *People*, 38 Ill., 520.
Lewis v. *People*, 44 Ill., 462.
Sanders v. *People*, 124 Ill., 218.
People ex rel. Lyons v. *Hanchett, Sheriff*, 16 Legal News, p. 320.
Harris v. *People*, 128 Ill., 588.
Farley v. *People*, 138 Ill., 97.
Wesley v. *State*, 30 Tenn., 502.
People v. *Shafer*, 1 Utah, 260.
The King v. *Kinnear*, 2 Bar. & Ald., p. 462.
Wiley v. v. *State*, 1 Swans. Rep., p. 256.
State v. *Populus*, 12 La. Ann. Rep., 710.
Commonwealth v. *Shields*, 65 Ky., 81.
State v. *Parrant*, 16 Minn., 178.
Peiffer v. *Commonwealth*, 15 Pa. St., 468.

The statute contains an express prohibition (by exception) against the defendant's consenting to the omission complained of (and this was the common law) and hence there could be no such consent or waiver.

In *Lewis* v. *People*, 44 Ill., 452:

The "*defendant entered a motion for a new trial, for the reason, among others, that the officer taking charge of the jury was not sworn as required by the statute. This ground was supported by affidavit of its truth.*" The trial court

overruled said motion. The Supreme Court of Illinois again said:

"A motion was entered for a new trial, upon the ground, among others, that the jury, when trying the case, after hearing the evidence, retired to consider of their verdict, in charge of an officer who was not sworn *in the mode prescribed by the statute.* The motion was overruled and a judgment entered on the verdict. The record discloses the fact that the officer in whose charge the jury were placed while deliberating on their verdict was not sworn, and this is the only error relied upon for a reversal.

"The provisions of the statute are clear, explicit and peremptory. **We know of no power, short of its repeal, to dispense with this requirement.** In the case of *McIntyre* v. *The People*, 38 Ill., 514, it was held to be error in case of felony to omit to swear the officer having charge of the jury.

For this error the judgment of the court below must be reversed and the cause remanded."

In *Sanders* v. *The People*, 124 Ill., 218, in reviewing the same question that court again held to the same ruling

In *Farley* v. *People*, *supra*, in passing upon the same question, that court again said:

"Waiving the question as to whether under this section the court can lawfully dispense with a sworn officer and authorize the jury in trials for felony to seal their verdict and separate, *even by the consent of the parties*, it is clear this record would sustain no such verdict in any case even that of a misdemeanor. * * * Besides, the attempt here is to dispense with the plain requirement of the statute, wisely enacted for the protection of not only a defendant charged with a high crime, but also to secure the People against all improper influences over juries after the question of the guilt or innocence of a defendant has been submitted to its deliberation, **and we are not disposed to extend agreements made under it by implication."**

In the face of these decisions, the Supreme Court of Illinois has in its opinion announced the doctrine that

the mere silence of the defendant and his counsel, when the jury are sent out without the officer being sworn, is sufficient to repeal or dispense with this requirement of the law.

In *People ex rel. Lyons* v. *Hanchett, sheriff*, 16 Chicago Legal News, Mr. Justice McAllister said:

"There is one distinction which he overlooks, and that is that the substantial constitution of the legal tribunal and the *fundamental mode of its proceeding are not within the power of the parties.*"

In the above case a jury was waived, and a felony case submitted to trial before a court, by consent of both the people and the prisoner.

In *Harris* v. *People*, 128 Ill., 588, the opinion of Judge McAllister is affirmed, and the court, approving the language of a New York case, says:

"The substantial constitution of the legal tribunal, *and the fundamental mode of its proceeding, are not within the power of the parties, and when issue is joined upon an indictment the trial must be by the tribunal* **and in the mode which the constitution and laws provide,** *without any essential change.* The public officer prosecuting for the people has no authority to *consent* to such a change, *nor has the defendant.*"

In conclusion the court there said:

"We are of the opinion, then, both upon principal and authority, that the Criminal Court has no legal power to try the defendant without a jury, notwithstanding her consent and agreement in that behalf, and that the trial and conviction are therefore erroneous." (pp. 593, 594.)

In *Wesley* v. *State*, 30 Tenn., 5021, the court said, quoting approvingly from another authority:

"I am also of the opinion that the consent of the judge would not make in such case that lawful *which was unlawful in itself*, for if the law requires that the jury shall

at all events be kept together until the close of a trial for a misdemeanor it does not appear to me that the *judge would have any power to dispense with it.*"

In that case it appears from the record and the opinion of the court that the jurors,

"*with the consent of the defendant and attorney-general, * * * were by the court permitted to disperse until the next morning.*"

In *People* v. *Shafer*, 1 Utah, 260, the court said:

"We do not think the error complained of was cured by the consent given by one of the attorneys for the defendant, even if it should be admitted that the attorney could give such consent for the prisoner. The defendant is not in a situation to exercise a fair choice, for he must run the risk of improper influences reaching their minds if he consents, or of prejudicing them against him if he refuses. According to what is probably the better doctrine, the consent of a prisoner to a separation, which the general rules of the law do not permit, should never be asked of him; and if it is asked and granted, or even granted without his being asked, it will avail nothing. It was error to allow the jury to separate, and the error was of such a nature as to vitiate the verdict."

In *King* v. *Kinneare*, 2 B. & A., 462, the court said:

"*I am also of the opinion that the consent of the judge would not make in such case that lawful which was unlawful in itself*, for if the law requires that the jury shall at all times be kept together until the close of the trial for a misdemeanor, it does not appear to me that the judge would have any power to dispense with it."

In that case the separation was *by the consent* of the accused.

In *Wiley* v. *The State*, 1 Swans. Rep., 256, the court reaffirmed the same doctrine, and held that

"If the jury pending the trial of a felony dispersed, though with the consent of the prisoner, a new trial will be awarded."

In *State* v. *Populus*, 12 La. Ann., 710, the court said:

"We do not think that the consent of the prisoner or of his counsel ought to suffice to permit the separation."

In *Commonwealth* v. *Shields*, 65 Ky., 81, the court held that:

"As the law is imperative that the officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, a failure on the part of the court so to swear the sheriff or other officer taking charge of the jury was a sufficient reason for setting aside the verdict and granting a new trial."

In *State* v. *Parrant*, 16 Minn., 178, upon an error raised for the first time upon the motion for a new trial, the court said:

"It may be admitted as to modes of procedure and trial it is competent for the court to make and alter its rules as the ends of justice may require, *when there are no statutory directions, but where there are any they must be adhered to.* (The jury in this case were allowed to take a recess for five minutes, without being accompanied by a sworn officer.) * * * We need not inquire whether the defendant could have waived the objection thus arising, for he has not attempted to do so. His consent was not asked, and that he did not object is therefore no evidence that he assented. For the aforesaid error in law the verdict must be set aside."

In *Peiffer* v. *Commonwealth*, 1 5 Pa. St., 468, it is held:

First, that the common law, with reference to the conduct of a jury in the trial of a case,

"touches not matter of form, but matter of substance,"

and that:

"In this case the jury were allowed to separate after they were impaneled and sworn. True, that took place

with the prisoner's consent. * * * Still, I think no consent of a prisoner in the extremity of his need ought to bind him."

The judgment was therefore reversed.

Under these authorities can it be contended that the defendant is not deprived of his liberty without due process of law?

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER THE CIRCUMSTANCES IN THE CASE AT BAR.

Section 10 of the bill of rights, being article 2 of the constitution of 1870, of the State of Illinois, provides:

"No person shall be compelled in any criminal case to give evidence against himself or *be twice put in jeopardy for the same offense.*"

If the discharge of the jury by Judge Haney on September 2, 1899, over the objection and protest of the defendant, without any good and sufficient *legal* reason, created, as we contend, a discharge of the defendant then again putting the defendant upon trial under the same indictment, for the same offense, was putting the defendant twice in jeopardy for the same offense, in contravention of the Constitution of the United States.

Chapter 28 of the Revised Statutes of this state (Hurd's Rev. Stat., 399,) provides,

"*That the common law of England*, so far as the same is applicable and of a general nature, and all stautes or acts of the British Parliament made in aid of and to supply the defects of the common law *prior to the fourth year of James the First* * * * and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of force until repealed by legislative authority."

Sec. 428 of the Criminal Code (Hurd's Rev. St.), provides:

"All trials for criminal offenses *shall be conducted according to the course of the common law*, except when this act points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law."

The common law of England referred to in our statute is that,

"A jury sworn and charged in case of life or member *cannot* be discharged by the court or any other, but they ought to give a verdict." (Coke upon Littleton, p. 227, par. F.)

and

"When the evidence on both sides is closed, and indeed, when any evidence hath been given, *the jury cannot be discharged unless in cases of evident necessity, till they have given in their verdict.* * * *" (Book 4, p. 359, Vol. 2, Sharswood Blackstone Com.)

The legislature not only by express enactment has adopted this common law of England, thereby adopting its law with reference to the discharge of juries, but recognized the effect of that law with reference to the juries in this state by the adoption of the following statutes: Section 434 of the Criminal Code (Hurd's Rev. Stat., 636), provides that

"the court in which a trial for a criminal offense in pending *may continue in session until the verdict is rendered and judgment entered*, notwithstanding the judge may be required by law to hold court in another county before the conclusion of such trial."

Thereby avoiding the effect of the common law rule that when the term expired *eo instanti* the jury were discharged.

Section 435 of the Criminal Code provides that

"when the jury retire to consider of their verdict in any criminal case a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of the court, **until they shall have agreed upon their verdict**, nor suffer others to speak to them, and that *when they shall have agreed* upon their verdict he will return them into court. * * *"

Not only is this a recognition of the force in this state, of the common law rule with reference to the discharge of the jury, but by the very words of the statute the officer is sworn to keep the jury together "*until they shall have agreed upon their verdict.*"

Section 5 of the bill of rights provides that "The right of trial by jury as heretofore enjoyed shall remain inviolate. * * *"

This latter section of the bill of rights has been construed by our Supreme Court in

Harris v. *People*, 128 Ill., 585, and
George v. *People*, 167 Ill., 447.

In the latter case (p. 456) the court said:

"By the clauses of the consitution above cited the common law right to a trial by the jury in criminal cases is guaranteed and declar d to be inviolable, and the statute requires that, except as therein provid d, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevail d at common law is necessarily excluded. It is, however, said that the words '*as heretofore enjoyed*' *relate to those enjoyed at the time of the adoption of the constitution of* 1870. * * * The word '*heretofore*' as used evidently relates to the past, and in order to determine the true meaning of the words 'the right of trial by juries as heretofore enjoyed' **it is necessary to go back to the common law of England. When this is done it will be found that the right of trial by**

jury constitutes certain specific things which cannot be dispensed with or disregarded on the trial of a person charged with a felony. * * * *If the language 'the right of trial by jury as heretofore enjoyed shall remain inviolate' shall be construed to mean that the system of trial by jury as it existed by statute at the time the constitution of* 1870 *was adopted was engrafted on and became a part of the constitution, as is contended, many embarrassing results never contemplated would follow.''*

This court has committed itself to the same general doctrine in *Muray's Lessee* v. *H. L. & I. Co.*,18 How., 272, *Thompson* v. *Utah*, 170 U. S., 343, cited at length *supra.*

In *Farley et al.* v. *People*, 138 Ill., 97, 100, the court said:

"Under our statute at common law the jury trying a defendant on a charge of felony, upon retirement to consider of the verdict, must be placed in charge of a sworn officer, whose duty it is to keep them together, to prevent others from speaking to them and not to speak to them himself except to ask if they have agreed upon their verdict, **and when they have so agreed to return them into court.**

In *Logg* v. *The People*, 8 Ill. App., 99, 106, the court said:

"That the acceptance of such verdict and the discharge of the jury, under such circumstances, entitles the defendants to their discharge is clearly established by the authorities above cited, and perhaps it may be said that those decisions rest upon the ground that the jury have been discharged by the court, *there being no necessity therefor*, and no consent of the prisoner being had without having determined the only issue in the case.

Where an obvious necessity arises or some matter occurring during the trial that could not be foreseen or prevented for discharging the jury, the court has the undoubted power to discharge them without releasing the defendant, even though such action be taken against his objection, as where the jury are unable to agree and longer confinement would be unreasonable, or the sudden

sickness of the judge. *Nugent* v. *The State*, 4 Stewart & Porter, 72; *Rex* v. *Edwards*, 3 Campbell, 207; *Rex* v. *Streek*, 1 C. & P., 413; *Stone* v. *The People*, 2 Scam., 325, and *Com.* v. *McFadden*, 23 Pa. St., 12.

In these and kindred cases the jury can be discharged and the prisoner again put on trial, but if no such necessity exist and the defendant does not consent to a discharge of the jury, he is entitled to a verdict upon the first trial, and if the court should, *in such case, discharge the jury without a verdict, it operates an acquittal.*

We also cite the following authorities to this point: *Weinzorplin* v. *The State*, 7 Blackford, 186; *Wright* v. *The State*, 5 Ind., 290; *Mahala* v. *The State*, 10 Yerg., 536; *McCauley* v. *The State*, 26 Ala., 135; *Hines* v. *The State*, 8 Humphreys, 597; *State* v. *Poage*, 3 Ohio St., 239; *Commonwealth* v. *Williams*, 2 Grattan, 570; *Grant* v. *The People*, 4 Parker, C. C., 527; *State* v. *Reynolds*, 3 Kelly, 60.

The decisions thus holding, it is true, have generally been made in cases of felony, but we are of the opinion that in this state no distinction can be made in this regard between felonies and misdemeanors, as the declaration in our bill of rights, 10 Const. of 1870, that 'no person shall be twice put in jeopardy for the same offense,' is sufficiently comprehensive to include any violation of the criminal law of the state, the word 'offense' applying alike to all crimes of whatever grade.

In the Constitution of the United States, and in most of the states of the Union, as well as in those of 1818 and 1848, of this state, this guarantee of personal liberty is somewhat different in its phraseology, being substantially that 'no person shall for the same offense be twice put in jeopardy of life or limb.' And it has been thought by some that such prohibition only extended to felonies, as it could not be said that a person who had committed a less offense than that of felony was placed in jeopardy of life or limb. If there could be any doubt regarding the proper construction of such clause in our prior constitutions, we think all such have been effectually removed by the words of the present one."

In *Mahala* v. *The State*, 10 Yerger's Reports (Tenn.), p. 235 (referred to in the same opinion), the defendant

(a slave) was indicted. She pleaded not guilty. On May 3 a jury was impaneled. The trial was concluded several days thereafter, at about 2 o'clock. After the jury was absent about half an hour they came into court and informed the judge that they could not agree; whereupon they retired again. In about an hour and a half they again came into court and stated that they could never agree. The jury thereupon retired again and did not agree that day. The court thereupon had them confined together that night, and the next morning, about half past nine, the jury again came into court and told the court it was impossible for them ever to agree.

Whereupon the court, being satisfied that the jury could not agree, discharged them. The defendant then made a motion for discharge upon the ground that the court had no authority to discharge the jury under the circumstances and that it operated as an acquittal. The court denied that motion, and thereupon the defendant was again placed upon trial and convicted and sentenced to death.

From the latter judgment a writ of error was prosecuted to the Supreme Court, and in passing upon the question there and here at issue, the court said:

"The right of trial by jury has always been regarded by the English and American jurists as one of the most sacred principles of the law, one to which the citizen is more deeply indebted than to any other for that security to life, liberty and property guaranteed in Great Britain and the United States to an extent unknown in other countries, and the preservation of which, in its purity, and independence, has at all times been guarded with a most watchful and jealous eye.

Therefore it is, that an attempt whenever made by the courts to interfere with the privileges of a jury, and endanger their independence, and the consequent security of the

subject, has at all times been promptly resisted, and though, occasionally, in times of great political excitement in England, it may have succeeded for the day, yet to the honor of the legal profession, the usurpation has always been rebuked, and the proper balance of power between the court and the jury quickly restored.

It is a well understood maxim of our law that the judges are to expound the law and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other. The jury in their deliberations upon the facts are as independent of the court as the judge in determining the law is of the jury, and the consequence is that when a case has been submitted to a jury there it must remain until it has been decided by them or is withdrawn from their consideration, **not at the will and pleasure of the court, but under circumstances justified by the law.** In the case now presented for the consideration of this court the jury returned no verdict, and the case was taken from their consideration, and *they discharged* against the consent of the prisoner. And the question is whether, under the circumstances, this was not an illegal exercise of power on the part of the court below, and the prisoner, in consequence, entitled to her discharge? This is a question of much importance, and although it has not, perhaps, been directly settled by adjudicated cases in this state, we feel much relieved in the conviction that it is well settled both by principle and authority in England, and a very respectable portion of the states of this Union. **Lord Coke in his 1 Institute, 227, b, and 3 Institute, 100 lays it down as a general rule that a jury sworn and charged by the court in cases affecting life or member cannot be discharged by the court, or any other, but they ought to give their verdict.** This doctrine, upon the authority of Coke, was afterwards engrafted by Hawkins and Blackstone into their elementary treatise on the criminal law. And although this principle was controverted in the case of Ferras cited in Sir Thomas Raymond, 84, and in a case of larceny reported in 1 Ventress, 69, and one reported in Salkeld, 646, yet it cannot be said to have been fully examined and completely overruled, until the decision of the case of the two Kinlocks,

reported in Foster from page 22 to 40, when it was considered by all the judges but one that the general rule laid down by Lord Coke had no authority to warrant it, and could not be universally binding; but that there were exceptions to it, and in that case determined that the court had power to discharge a jury at the request of the prisoners, assisted by able counsel, and with the intent of imparting to them a privilege which they could not otherwise have enjoyed. Since that decision it has not been doubted that the courts have the power to discharge juries without their rendering a verdict, but only as we think in cases of *manifest necessity*. All the cases of exception (to the general rule as laid down by Lord Coke), specified in the elaborate opinion of Mr. Justice Foster in the case of the Kinlocks, *are cases of necessity*, and there is no authority to be found in the English books which sustains the position that a jury may be discharged in a criminal case without the consent of the prisoner, but from necessity. Such also, we think, has been the train of the decisions in the United States.

In the case of *The People* v. *Goodwin*, 18 Johnson's Reports, 187, Judge SPENCER, in delivering the opinion of the court, says: 'Upon full consideration, I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet, that it does exist in cases of extreme and absolute necessity.'

In the case of the *United States* v. *Coolridge*, Gallison's Rep. 364, Justice STORY says 'that the power to discharge a jury in capital cases should only be exercised under very extraordinary and striking circumstances.'

In the case of the *United States* v. *Haskell & Francois*, 41 Wash., 411, Judge WASHINGTON says 'that a court is fully authorized to discharge a jury in cases of necessity, in capital cases as well as misdemeanors.'

In the case of the *United States* v. *Perez*, 9 Wheaton, 579, Judge STORY, in delivering the opinion of the court, says:

'We think that in all cases the law has invested courts with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity, for the act, or the ends of public justice would be defeated;

but that the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes, and in capital cases especially the court should be extremely careful how they interfere with any of the chances of life in favor of the prisoner.'

In the case of *The People* v. *Barrett*, LIVINGSTON, Judge, says:

'Without denying the right of courts to withdraw a juror, in criminal cases, and put the defendant on trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of urgent necessity, *when by the act of God, or by some sudden and unforeseen accident*, it is impossible to proceed without manifest injustice to the public or to the defendant himself.'

These decisions, made by the first tribunals of the country, completely sustain the position that the power to discharge a jury, without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity.

This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads. 1st. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict. 2nd. Where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself, by the visitation of providence, prevented from being able to attend to his trial; and 3rd. Where there is no *possibility* for the jury to agree upon and return a verdict.

It is upon the last of these propositions that the question in the case under consideration arises. The jury were impaneled on Thursday evening, at 2 o'clock, and were discharged at 9 o'clock on Friday morning, because they could not agree upon a verdict, the court continuing its session until some time on the Saturday following. Now, the question is, was this such a case of necessity as justified the court in discharging the jury? A jury may not be able to agree upon a verdict for many rea-

sons, *such as sickness or insanity of one or more of the jurors, sudden exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors without the consent of the court.* These are cases put in the books, and with others of like character constitute what we will distinguish as cases of physical impossibility. A jury may also not be able to agree **because their minds cannot come to the same conclusion from the facts submitted to their consideration.** This we would consider as a case of *moral* impossibility; and we are called upon to say whether it constitutes a necessity for the discharge of a jury before the time arrives when the court must adjourn. **We think it does not.** In the case of the Kinlocks, Mr. Justice Foster enumerates many cases in which from necessity a jury may be discharged, and never once intimates that it may be done merely because *they could not bring their minds to concur in the same opinion.* It cannot be possible that he should have [neglected doing so if in his opinion it had constituted a case of necessity, for it would be so palpable a course for the exercise of this delicate power, and would be of such frequent occurrence that no judge could overlook it in enumerating the causes for which a jury might be discharged from rendering a verdict. Indeed, it is almost manifest that Mr. Foster was of opinion that it did not constitute a case of necessity, for in commenting upon Mansel's case he says, 'the truth of the case was no more than this, the jury were not agreed on any verdict at all, and therefore nothing remained to be done by the court but to send them back and keep them together until they should agree to such a verdict as the court could have received and recorded.'

There is no English decision, then, sustaining the position that the court has the power to discharge a jury because they cannot agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood."

In conclusion the court says that;

"Upon the whole the power of discharging a jury against the consent of the prisoner is of such a dangerous

character that we hesitate not in saying that it should not be exercised by the courts where the jury cannot agree on a verdict *unless they be prevented by a physical impossibility from so doing*, and that when such impossibility does not exist the jury should be kept together until such time as the court is about to adjourn, when, of necessity, they must be discharged. There was no physical impossibility for the jury to agree, * * * and the judgment must, therefore, be reversed and the prisoner discharged."

In *McCauley* v. *The State*, cited in the opinion in *Logg* v. *The People*, *supra*, after the defendant had been put upon trial, without the consent of the defendant the court allowed a co-defendant leave to sever the trial, and withdrew the cause as to the defendant from the jury to whom the case had been submitted for trial. In passing upon the effect of the discharge the Supreme Court of Alabama said, (referring to numerous authorities,) that

"In *Ned* v. *The State*, 7 Porter's R., 187 (a capital case) our predecessors, upon a review of the leading English and American authorities, decided (among other things) that courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given; that a court does possess the power to discharge a jury in any case of pressing necessity; that, although the judge determines the existence of the facts, yet, when they are ascertained, the law determines whether they constitute a case of necessity; and that the unauthorized discharge of a jury is equally as fatal to any subsequent trial as an acquittal or conviction.

In *Cobia* v. *The State*, 16 Ala., 781 (an indictment for murder), this court held that the discharge of the jury, before the verdict was rendered, 'must be understood to mean a legal discharge' and that the result of the authorities was, 'that if the prisoner be put on his trial upon a sufficient indictment, and the evidence in support of the charge is submitted to the jury, the court cannot arbitrarily interfere and arrest the trial by discharging the jury, and if the court should discharge the jury be-

fore they deliver their verdict, without a sufficient legal reason for doing it, the prisoner shall never be tried again.'

Every decision of this kind rests upon this solid ground: that such decision is essential to preserve inviolate to the prisoner the right of trial by jury, as guaranteed by the constitution. This right cannot mean less than a right to have the deliberations of the jury, when once they have begun the trial and heard any evidence, continued until the occurrence of a sufficient legal reason for their discharge, and the right to have, during the entire period of such continuance, the chance of a verdict of acquittal at the hands of that jury. *It is impossible for any judge to say that the jury would not have acquitted him.* It is equally impossible for any judge to say he can get another jury who will acquit him. The law does say, if the jury ever does acquit him, their verdict shall not be set aside by any court, however unwarranted by the law and the evidence in the case that verdict may be. The chance of a verdict by acquittal at the hands of each jury to whom the cause and any evidence have been submitted, it is obviously important to a prisoner, and is clearly embraced in the guaranty of trial by jury. To deprive the prisoner of this chance by the lawless act of the court in discharging the jury is a flagrant wrong, for which there is no remedy, *except to treat such deprivation as equivalent to an acquittal.* To hold that there is no remedy for such a wrong is to hold that the right of trial by jury has ceased to be a right; for if by such lawless act of the court one jury may be discharged, an indefinite number may be discharged in the same manner.

That the ground above stated is the unassailable ground upon which the decisions above cited must rest is evident from the fact that whilst they hold that the unauthorized discharge of a jury before they render a verdict will protect the prisoner against a subsequent trial as fully as a verdict of acquittal, they also hold that if the prisoner has been actually convicted, and the judgment has been reversed, or a new trial granted, at his instance, he may be tried again. The principle which reconciles these two positions, thus maintained in these decisions,

may be thus stated: The constitutional guarantee of trial by jury is broken by the lawless discharge of a jury after they hear some evidence and before they render a verdict; but, where a trial is actually had, and a verdict of guilty rendered, that guarantee is not broken by mere errors committed on that trial, for the correction of which a remedy is provided by law. If the prisoner has not been lawlessly deprived of his chance of a verdict of acquittal, by an unauthorized discharge of a jury, but has had a trial by jury and been found guilty—in that case, although errors may have been committed by the court on the trial, to his prejudice, he has his remedy whereby he can procure from a revising court the correction of such errors—the reversal of the conviction, and another chance for a verdict of acquittal on a subsequent trial. If, however, the prisoner has been deprived of his chance of a verdict of acquittal by a jury who have begun his trial and heard some evidence, by the lawless discharge of that jury, there is no remedy anywhere for this lawless discharge, except to treat it as equivalent to an acquittal. **To withhold the only remedy in such a case is to surrender to the lawless discretion of the judge the constitutional right of trial by jury."**

The same doctrine was reaffirmed by that court in even a stronger opinion in *ex parte Vincent*, 43 Alabama, 402.

In *Commonwealth* v. *Williams*, 2 Grattan (Va.), 570, the question arose upon an application for a writ of habeas corpus. The facts set forth are that the defendant was indicted and put upon trial on October 28. The jury were sworn in his case, and having heard the same, were sent out to consult of their verdict, and not being able to agree, were, on the adjournment of court on that day, committed to the care of the sheriff and the prisoner remanded to jail. On the 29th of the same month the defendant was again sent to the bar and the jury were brought into court, and not having agreed on a verdict, were again committed to the custody of the sheriff and the defendant

again remanded to jail. On the 30th day of the same month the jury were again brought into court, and not having agreed on their verdict were again committed to the custody of the sheriff. That after some time they declared it was impossible for them to agree, and that the court thereupon made the following order:

"**That the court declared it as its conviction that there was no possibility of the said jury rendering a verdict during the term,** and that the further detaining of them would be a hardship upon them and would not promote public justice nor benefit the accused. Whereupon it was ordered by the court that the said jury be discharged and he (the petitioner) again remanded to jail, to which order discharging the jury the prisoner objected."

The court commented upon that state of facts as follows:

"The question presented for the consideration of the court is, whether the court, in a case of felony, can properly discharge the jury who are sworn in the case, without the consent of the accused, *merely because the jury cannot agree.* We think the courts have not and ought not to have such power. No such practice has ever prevailed in Virginia; and so far as the judges now composing this court are informed, this is the first instance in which it has ever been done or attempted. In looking to England, we do not find such power to have been exercised or claimed there. In looking to our sister states, we find the practice has varied; in some of them, to wit, in New York and Massachusetts, the courts have claimed and exercised this power. See the cases of Olcott, 2 John. Cas., 301; Goodwin's case, 18 John R., 187, and Green's case, 13 Wend. R., 55; Barden's case, 9 Mass. R., 467; Purchase's case, 2 Pick. R., 521. In Pennsylvania the judges have denied the power. See the cases of Cook and others, 6 Serg. & Rawle, 577; and Clue's case, 3 Rawle, 498.

We incline to the views and reasoning of the courts of Pennsylvania on this important question.

This court, in the case of the *Commonwealth* v. *Fells*, 9 Leigh, 613, decided that the court might properly discharge the jury in a case of felony, whenever a necessity for so doing existed; and cited as authority the case of Ann Scalbert Leach's C. L., 620; *Rex* v. *Stevenson*, *id.*, 546; and *The King* v. *Edwards*, 4 Taunt. R., 309. In the case of Ann Scalbert, after the jury were sworn, one of them fell down in a fit. In the case of *The King* v. *Stevenson*, the prisoner himself became suddenly ill and unable to attend to his defense. In the case of *The King* v. *Edwards*, one of the jury became ill and unable to attend to the examination of the case. In Fell's case the jury had been kept together nine days; the health of one of the jurors was suffering materially from the long confinement; and the personal attentions of another juror were required by his wife, whose peculiar and delicate situation rendered it proper and necessary. In that case the judge before whom the case was tried discharged the jury, and this court affirmed the decision, and decided that the facts of that case showed a case of necessity, which rendered the discharge proper. *But while we approve that decision, we think that mere inability on the part of the jury to agree presents no such case of necessity.* We think, moreover, the exercise of such a power of discretion ought not to be allowed; that the accused is entitled to be tried by the jury he has selected in the first instance, unless there be some *imperious* necessity for their discharge, in which event another jury may properly be sworn to try him. The practice in Virginia has been, in the case of a hung jury, in a trial for felony, either to adjourn the court at the end of the term, taking no notice of the jury; in which case they are necessarily discharged by operation of law, or else to call the jury in and discharge them simultaneously with the final adjournment of the court; which practices this court approve and think right."

The court thereupon unanimously decided that the petitioner was entitled to his discharge, and so ordered.

We have quoted thus at length from the above authorities that this court might consider the reasoning of those

cases. In the cases following, this question was considered, and we quote briefly from the opinions of the respective courts in which this point has been determined.

NORTH CAROLINA:

In the case of *State* v. *Ephriam*, 19 N. C., 162: The question arose upon *habeas corpus*. The petitioner was charged and put upon trial for murder. The jury, after having been out some time, returned into court and declared they could not agree. Two of the jurors stated that they were ill, one of whom said he had a sore throat, the other that he had been attacked with rheumatism. The court thereupon discharged the jury and recited upon the record that "the court, in the exercise of its decretion, believing this to be a case for the discharge of the jury, ordered a juror to be withdrawn and the jury to be discharged." In passing upon the question the court said:

"Our conclusion, therefore, from so much of the record as speaks of what was done in the Superior Court or by that court touching the discharge of the jury is, that the judge ordered the discharge and intended to say that he ordered it *not upon any necessity, but as being a thing within his discretion* and because this was a proper case for the exercise of this discretion upon his official responsibility. * * * (171.) There is, therefore, no foundation for the notion of a moral necessity for the discharge of a jury on account of a moral disability, as it is called, on the part of the jury to make up their minds alike and agree on a verdict after a reasonable period for consultation. It is doubtless a relief to the jury to be freed from longer confinement and privation, which is the consideration from which this practice seems chiefly to have grown up. * * * (176.) Our decision is, therefore, founded upon this, that *the record shows that the jury was discharged without an explanation thereof showing any state of facts from which the discharge becomes necessary.* This is indispensable, because by no other means

but the record can the necessity appear, and by that it can always be made to appear, with the single exception of the sudden insanity or death of the judge during the trial—a case not yet decided, and which may probably found another exception upon necessity to the general rule." The prisoner was thereupon discharged.

In the case of *State* v. *Altman*, 64 N. C., 364, the jury retired to consider of their verdict at 8 o'clock P. M. of Saturday in the first week of the term, "and being unable to agree," came to the bar of the court on Monday evening at half past five o'clock, when a juror was withdrawn and the jury discharged. The prisoner moved for his discharge from custody. In passing upon the question the court said (366):

"The case was committed to the jury on Saturday evening of the first week of the term, and the jury was discharged on the evening of the Monday of the second week, after a deliberation of about forty-five hours. We do not think that the mere lapse of that space of time without an agreement by the jury, coupled, as we may suppose it to have been, with their declaration that they probably could not ever agree, was a sufficient cause for their discharge. To be put in jeopardy of one's life through a criminal trial is a grave occurrence. The common law, as once understood, absolutely prohibited a second jeopardy, and the principle is incorporated in the constitution of the United States." The prisoner was therefore discharged.

MISSISSIPPI:

In the case of *Whitten* v. *The State*, 61 Miss., 717: The question there arose whether or not the accused should be discharged because of the discharge of the jury without rendering a verdict. In that case the jury retired to consider their verdict at half past 8 at night on the last day of the term. At 12 o'clock the court sent for the jury and after polling them "ascertained that they

could not agree and were not likely to do so." Thereupon the court discharged them, the defendant neither consenting nor objecting to such action, and the court was adjourned. Being arraigned again for the same offense, the defendant pleaded the above facts and claimed forever to be discharged, because the record showed that he had been once in jeopardy, and the jury having been discharged without his consent he could not be again tried for the same offense. The sole question in this case was "Whether the court had a legal right to discharge the jury." In passing upon the question, the court said:

"Whatever doubt may exist in other states it is well settled here that the submission to a lawfully impaneled jury and a subsequent willful or unlawful dismissal of that jury constitutes former jeopardy, and entitles the party to a final discharge. It is equally well settled that this effect will not follow *when the discharge of the jury is compelled by a physical or legal necessity*, as by the death or sickness of a juror, by the failure of the jury to agree after full and sufficient deliberation, or by the legal termination of the term. Some such necessity, however, must compel the discharge in order to make it permissible; and up to the adoption of the code of 1880 the court could order a discharge upon the ground that the time for closing the term had by law arrived. Josephine's case, 39 Miss., 613; Teat's case, 53 Miss., 439.

Such was the law until the adoption of the Code of 1880. Section 2292 of that code is as follows: 'When the trial or hearing of any case, civil or criminal, has been commenced and is in progress in any court, and the time for the expiration of the term as prescribed by law shall arrive, the court may proceed with such trial or hearing and bring it to a conclusion in the same manner and with the same effect *as if the stated term had not expired.*'

By this section there can be no ending of a term when a trial has been entered upon and is not completed, or at least *there can never be any necessity for such end-*

ing, because the court, being empowered to continue the term, may do so at its own pleasure.

But the power to dismiss a jury in prosecutions for a felony can never depend on pleasure. Such power is wholly dependent on necessity, either physical or legal. *Where there is no necessity there is no power.* Such unquestionably are our adjudications. It is a contradiction in terms, therefore, to say that the power of continuing the term is optional with the judge. The trial being begun and the jeopardy encountered, any dismissal of the jury is arbitrary which is not compelled by necessity. If the court may continue at the pleasure of the judge, it is idle to say that necessity compels the discharge of the jury pending the trial on the ground only that the law speaks of a court being held elsewhere.

Court is never obliged to meet elsewhere so long as a trial is progressing where it then is.

Whenever the court may prolong a term, it must do so, **since the prisoner by his silence consents to nothing.**

Such are the decisions in the only cases where we find where the direct question has arisen under statutes nearly similar to our own. *Wright* v. *State*, 5 Porter (Ind.), 290; *State* v. *McGimpsey*, 60 N. C., 337."

In conclusion the court held that "the minute the jury was discharged the prisoner was discharged also."

The same rule of law was followed and adopted in *Helen* v. *State*, decided by the Supreme Court of Mississippi in 1889, 6 Southern Reporter, 322.

VIRGINIA:

Williams v. *The Commonwealth*, 2nd Gratt., 568, quoted *in extenso, supra.*

WEST VIRGINIA:

In the case of *Crookham* v. *The State*, 5 W. Va., 510: The Court of Appeals of West Virginia reaffirmed the doctrine of *Williams* v. *The Commonwealth*, 2d Gratt., 567, and in commenting upon that case refer to the provisions to be found in the Code of West Virginia, which are

that: "In any criminal case the court may discharge the jury when it *appears* that they cannot agree on a verdict;" and referring to that provision of the code the court says: "The order of the court states that the jury *being unable to agree* upon a verdict were discharged. Unless the provision of the code just quoted is to be disregarded, the court committed no error in discharging the jury without the consent of the prisoner." In other words, if that provision of the code had not been in force the court would have committed error in discharging the jury.

NEBRASKA:

In the case of *Conklin* v. *The State*, 41 N. W. Rep. (Neb.), 788, decided February 20, 1889: The jury had been out a space of twenty hours, and being unable to agree, they were discharged. The defendant pleaded these facts under a plea of former jeopardy, when he was placed upon trial a second time. Under section 485 of the criminal code of Nebraska a court may discharge a jury "in case * * * they have been kept so long together there is no probability of agreeing. * * *"

The journal entry of the court showed:

"Comes also the jury and reports in open court their inability to agree upon a verdict in this cause, and it appearing to the satisfaction of the court, upon examination of Brown, one of the jurors in said case, that by reason of his sickness he was unable to further perform his duties as a juror, and upon further examination of each and every juror in said case, the court finds there is no probability of the jury's agreeing upon a verdict and that they had been out twenty-one hours without sleep, or a suitable place to sleep or rest, said jury is, therefore, discharged without day, without prejudice to the prosecution."

In an elaborate opinion, passing upon the effect of the

facts thus stated in the plea of the defendant, to which the state had demurred, the Supreme Court ordered that the judgment of the lower court in sustaining the demurrer to the plea should be overruled and that the defendant should be placed upon trial on the plea if the state had any answer to make thereto.

To the same effect is *State* v. *Schuckart*, 18 Neb., 754.

PENNSYLVANIA:

In the case of *Commonwealth* v. *Fitzpatrick*, 121 Penn. State Rep., 109: The facts are expressed in the opinion of the court, and the court there said:

"The defendants in error, who were defendants below, were indicted and put on trial for murder. At the conclusion of the evidence the questions involved were discussed by counsel, and the jury, after the charge of the court, retired to deliberate upon their verdict. This was on the 1st day of February, 1887. On the 5th of the same month, which was Saturday, and the last day of the regular term of the court, the jury not having agreed upon a verdict, was discharged by the court, notwithstanding the objection of the defendants. The learned judge of the Oyer and Terminer caused the following adjudication to be entered on his minutes: 'Now, to-wit, 5th February, 1887, the jury in this case having come into court repeatedly and affirmed that they could not agree, and that they had made every possible effort to agree, and that they still cannot agree, the term of the court now expiring, the court being satisfied that it is useless to detain the jury longer, the jury are discharged from the further consideration of the case, to which order and discharge the defendants except, at whose request a bill is sealed.'

The defendants were again called for trial in the following month of May, and pleaded specially the former trial and the discharge of the jury without rendering a verdict, in bar of any further trial for the same offense. The commonwealth demurred to this plea, and the court, after argument, entered judgment on the demurrer in favor of

the defendants and discharged them from custody. The question thus raised is whether the facts set forth in the special plea show that the defendants have been once in jeopardy for the offense now charged against them. If so, the constitutional provision that 'No person shall for the same offense be twice put in jeopardy of life or limb,' is a conclusive answer to the indictment.

Jeopardy is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must under such circumstances submit the sufficiency of his defense to the decision of a jury of his peers. He is in their hands, exposed to the danger of conviction with all its consequences; or, in the language of the bill of rights, he is 'in jeopardy.' From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury. Unless some overriding necessity arises after the jeopardy begins, the trial must proceed until it ends in a conviction or an acquittal. In a capital case, therefore, the court has no power to discharge a jury without the consent of the defendant, unless an absolute necessity requires it. *Commonwealth* v. *Cook et al.*, 6 S. & R., 577. **The mere inability of the jury to agree within a few hours or days is not such a necessity:** *Commonwealth* v. *Clue*, 3 S. & R., 498; nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended.

The serious illness or insanity of the defendant, and the illness, insanity or death of the judge or a juror engaged in the trial have been held to create a necessity for the withdrawal of a juror and the postponement of the trial; and it is not difficult to imagine other cases in which a similar holding should be made. In this case, however, we take notice of the fact that Lackawanna County constitutes a judicial district with a president and an additional law judge. The adjudication does not suggest any reason why the term could not have been extended, and we assume that there was none. There was, therefore, no case of necessity presented by the facts stated in the adjudication, nor did the learned judge undertake to put a finding of such necessity upon the

record. The adjudication only asserts that **'the court is satisfied that it is useless to detain the jury longer,'** and then directs their discharge. This order was a mistake. It was made in disregard of the protest of the defendants. They were in jeopardy when the order was made, and its effect was to end the trial and the jeopardy without a verdict and without their consent. When they were again called upon to answer and subject themselves to the jeopardy of a trial, they had a right under the constitution to say, 'We have been once put in jeopardy for this crime and we cannot be compelled to undergo the same peril a second time for the same offense' This was the effect of their special plea and it was unanswerable *Peiffer* v. *Commonwealth*, 15 Pa., 468; *McFadden* v. *Commonwealth*, 105 Pa., 1; *Hilands* v. *Commonwealth*, 111 Pa., 1.

* * * * *

The judgment entered upon the demurrer was right, therefore, and it is now affirmed."

To the same effect is

Hilands v. *Commonwealth*, 111 Pa. Stat., 1.

Commonwealth v. *Cook*, 6 Sar. &. Rawle, 577.

Commonwealth v. *Clue*, 3 Rawle, 497.

KENTUCKY:

O'Brian v. *The Commonwealth*, 72 Ky., 333, 339.

Robinson v. *Commonwealth*, 88 Ky., 386.

ALABAMA:

McCauley v. *The State*, 26 Ala., 135.

Ex parte Vincent, 43 Ala., 402, cited *supra in extenso.*

Ned v. *State*, 7 Porter (Ala.), 187.

In the latter case the exact question here presented was before the court, and in passing upon that point the court

said, among other things, after reaffirming the decisions in Pennsylvania and adopting their rule and reasoning:

"The law declares that everyone shall be entitled to the benefit of a trial by jury, *and as long as they continue in health and capable of reasoning on his case he is entitled to the exercise of these powers.* Whenever, from exhaustion or any other cause, a juror becomes unable to exercise these functions and the fact is shown to the court to be such as must continue, then a case of necessity has occurred and the jury ought to be discharged." (p. 214.)

The court thereupon reversed the judgment of the lower court and discharged the prisoner.

TEXAS:

Powell v. *The State*, 17 Texas Court of Appeals, 345.

Wright v. *The State*, 15 S. W. Rep., 717.

From the evidence taken (by the court, in the absence of the jury) upon the defendant's offer to prove that he had once been in jeopardy, it appeared that the trial of the defendant began upon August 29, 1899, and that the jury retired on September 1, at the hour of about 4:30 in the afternoon. *It also appeared from the evidence that the court determined to discharge the jury before calling the jury in or ascertaining how they stood, or whether or not they could agree, in fact, that determination had been reached before the court even entered the court room*, that all the court had before him at the time of the discharge was the following colloquy between the court and the jury: "Have the jury arrived at a verdict or agreed upon a verdict?" to which the foreman replied, "We have not." The court thereupon asked the foreman, "Have you discussed the questions in the case among yourselves?" to which the foreman replied, "We have, your Honor";

that thereupon the court asked the foreman, "Do you think you can arrive at an agreement?" To which the foreman replied, "I believe not, your Honor;" and that thereupon the court asked the rest of the jurors the question, "Is that your opinion, or are you of that opinion?" To which no reply was made. There was no complaint made by the jurors, nor any request for a discharge by said jurors, and the jurors and court were physically in good health. (273)

The defendant called one of the jurors of the discharged jury for the purpose of showing the physical condition of the jurors at the time of the discharge and offered so to show, but that offer was refused. (276) To this evidence thus offered and introduced, the state interposed a demurrer, which demurrer was sustained and the defendant was not allowed to have this evidence considered by the jury.

If the court has the power arbitrarily and without any necessity therefor to discharge the jury by merely assuming that they are unable to agree, the protection which trial by jury is supposed to afford is entirely taken away, and an accused person may be placed in jeopardy as often as the whim of the trial judge shall be exercised to direct the jury to cease their consideration of the evidence and retire to their homes.

The practice in the Criminal Courts of Cook County has not conformed to the plain letter of the law. A failure to understand, or at least to observe, the principles which underlie the administration of criminal justice and secure the rights of accused persons has led to various acts and assumptions on the part of judges which violate the rules of practice and the law of the land.

This practice of discharging juries, when no necessity for such discharge existed, by a mere exercise of what is termed discretion, although of long standing, is none the less pernicious and dangerous, and "*to withhold the only remedy in such a case is to surrender to the lawless discretion of the judge the constitutional right of trial by jury.*"

———o———

Authorities seemingly opposed to this position and heretofore relied upon by the people, are the following:

Profit on Jury Trials, Sec. 490.

Section 491 states the rule that:

"The inference is that the necessity, whatever it may be, must appear upon the record, and it must be adjudged by the court *from proper evidence* that such necessity existed which made a discharge of the jury *imperatively necessary;* hence where it appeared that the necessity was not made apparent to the court and was not properly adjudged to exist and the jury were discharged it was held that this was sufficient as a plea of autrefois acquit on a future trial of the same indictment."

Windsor v. *The Queen*, 118 Eng. Com. Law Reps., 141, citing from page 143. On page 169, the court said:

"In a generation or two after he (Coke) wrote we find Lord Hale stating that where upon the trial the proof of the offense charged turned out to be defective it was a practice prevailing at Newgate and in most circuits of England to discharge the jury in order that the prosecution might come better prepared upon a future occasion, and we find that eminent lawyer as well as humane man speaking with approbation of this practice as tending to prevent the frustration of justice where evidence which might be forthcoming happened to be temporarily wanting; and he speaks of it as having prevailed for a long time. Afterwards in consequence of the abuse for the practice on political trials, and possibly in consideration

of the hardship on the accused, who being prepared for his defense on the first trial might want the means of his defense on the second, the judges, after consulting among themselves—for it does not appear there was any judicial decision on the point—adopted a different rule, viz: that on a trial for felony the jury should not be discharged at the discretion of the judge."

From a reading of this part of the citation it is perfectly apparent that the rule as contended for by Lord Hale was not that part of the common law, which was adopted under our constitution and statutes.

It has never been contended that after the beginning of the trial of a criminal case the court might discharge the jury because some evidence or all evidence was wanting on the part of the state.

On page 181 of the same authority the court said:

"In the present case it appears from the record that the trial began on Friday morning and was unexpectedly protracted. A few minutes before midnight on Saturday the jury, after five hours deliberation having stated that they were not likely to agree, the judge had to determine a most difficult question, viz, would a verdict returned on Sunday be lawful and right? I think that to sit judicially on a criminal trial on Sunday would be indecent and should not be done if it can be avoided. At any rate it is a matter of grave doubt whether a verdict recorded on Sunday would not be void in law, and therefore I never could say that it was not a proper exercise of judicial discretion in a judge to discharge the jury and so avoid raising that difficult question. It is said that he might have adjourned until Monday and ordered that the jury should have refreshment in the interval. But it is very doubtful whether a judge has power to adjourn a case after the jury have retired to consider their verdict, and it is also a doubtful question whether the having refreshment would not have vitiated their verdict."

It is perfectly apparent therefore, that the opinion in the above case was rendered with the evidence before

the court that it would have been impossible for the jury to have returned a verdict which would have been good in the case on Sunday, and the court therefore sought the lesser of two evils, and held that "the judge had to determine a most difficult question, viz: would a verdict returned on Sunday be lawful and right," and that "it is a matter of grave doubt whether a verdict recorded on Sunday would not be void in law," and therefore held that the discharge of the jury was not beyond the discretion of the court.

11 Am. & Eng., 950. The author there says:

"The discharge of the jury is the criminal case upon a valid indictment without the consent of the defendant not called for by *imperious necessity*, operates as an acquittal and bars a further trial. But where the discharge is *absolutely necessary* for the purposes of justice, no jeopardy attaches."

Dobbins v. *People*, 140 St., 493.

In that case the Supreme Court of Ohio said (502):

"For wise reasons no investgation is frequently permitted of what transpires in the consultations of the jury; and when they unanimously return their inability to agree it is conclusive of the fact that they have not agreed and may rightfully have its just weight in determining the question whether they are likely to do so. But as this must be mere matter of opinion in which they are often found mistaken it ought never to be permitted to take the place that the actual fact that they have deliberated so long has under all the circumstances attending it to convince the court that no agreement can be expected. When the court is so convinced and the facts are such as to justify the conviction, the order discharging may be made. But as this order may most materially affect the legal rights of the party, and as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, *that the obstacle which the law will recognize as a*

necessity did in fact exist, that it engaged the attention of the judge, that his order was based thereon and was the result of consideration and decision. * * * But it is claimed by counsel for the state that this whole matter is one of pure discretion in the court where the trial is had. * * * We are of different opinion. It is one of the very clearest of the legal rights of the accused to require a verdict if one can be had, **and we know of no case in which any one can be deprived of his legal rights at the mere irresponsible discretion of a court."**

The Supreme Court of Ohio then reviewed the decisions of New York, which have also been relied upon by the People, and with reference to those authorities said:

"But the decision of that court (N. Y.) is undoubtedly placed upon the ground that it was a matter of discretion in the court below, and if the power had not been discreetly exercised there could be no remedy. This may be true in New York, but it is not true in Ohio."

This decision must be read in connection with Sec. 7313 of the Ohio Code, which provides that:

"The court may discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal."

Notwithstanding this section of the statute, the Supreme Court of Ohio has held that:

"In such case the record must show the existence of the necessity which required the discharge of the jury. Otherwise the defendant will be exonerated from liability of further answering to the indictment."

Dobbins v. *State*, 14 O. St., 493.

Poage v. *State*, 3 O. St., 229.

Hurley v. *State*, 6 Ohio, 399.

U. S. v. *Coolidge*, 2 Gall. Reps., 363, a decision by Mr. Justice Story in a misdemeanor case, and the entire opinion of the court is as follows:

"The question is simply this: A party is on trial before a jury and a circumstance occurs which will occasion the total failure of justice if the trial proceed. Have the court in such an emergency power to withdraw a juror? It has been stated from the bar that in capital cases the court have not this power. But in a case in Foster's Crown Law, and in several other cases, it has been held that they have. In misdemeanors there is certainly a larger discretion, and until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that in the course of the trial the accused should be reduced to such situation as to be totally incapable of vindicating himself. Shall the trial proceed and he be condemned? Suppose a juror is taken suddenly ill and incapable of attending to the case. Shall the prisoner be acquitted? Suppose that this were a capital case and that in the course of the investigation it had clearly appeared that on Lee's testimony depended a conviction or an acquittal. Would it be reasonable that the case should proceed? Lee may perhaps during the term be willing to testify. Under these circumstances I am of opinion that the government is not bound to proceed, but that the case be suspended until the close of the term that we may see whether the witness will not consent to an examination."

We believe this authority requires no comment. It has never been contended in Illinois that a case may be nollied for the purpose of allowing the prosecution the opportunity to get the evidence necessary to convict the defendant. The court will bear in mind, however, that this decision is by Mr. Justice Story, in the State of Massachusetts. We will have occasion to refer to Mr. Justice Story's opinion in the *U. S.* v. *Perez*, 9 Wheat., 579, hereafter.

Barrett v. *The State*, 35 Ala., 406.

It is unnecessary to cite at length from that authority. In the concluding paragraph of the opinion the court said:

"We take occasion, however, to remarkthat it is much the more prudent and safe course for the circuit judges to protract the session of the court to the end of the term prescribed by law, where the duration of the term is fixed, unless some great and overruling necessity requires a different course, or unless the prisoner consents to the discharge of the jury, for it is an extremely delicate and hazardous thing for the court to interfere with the prisoner's chances for life or liberty by acting upon the apparent absence of any probability of an agreement by the jury."

In the case of *Ex parte Vincent*, 43 Ala., 402 (decided some years later), upon a *habeas corpus* proceeding, the prisoner was discharged for the reason that after the jury had been out three days and after the court had asked the jury whether they could agree and they stated that they could not possibly agree upon a verdict, and asked to be discharged, the court held that:

"This reason was not sufficient to authorize the judge presiding to discharge the jury without the consent of the defendant. He had gone to trial and submitted his case to the jury and was entitled to the whole term to have his case disposed of, unless some necessity intervened which rendered this impracticable or impossible. His rights were the same had there been no other case in court but his own. The jury were therefore improperly and illegally discharged. This was tantamount to an acquittal. Therefore the prosecution cannot be further maintained against the defendant in the court below. Our conclusion is that the prisoner, John Vincent, must be discharged from further prosecution on said indictment, or for the offense therein charged."

People v. *Harding*, 53 Mich., 481.

This authority is rendered in view of the 29th section

of the Constitution of Michigan, to be found on page 54 of the General Statutes of Michigan (Edition of 1882), which provides that:

"No person, after acquittal upon the merits, shall be tried for the same offense."

It is therefore readily seen that the Constitution of Michigan is entirely different from that of Illinois, which provides that no person shall twice be placed in jeopardy for the same offense. A man may be placed in jeopardy and is placed in jeopardy without having "an acquittal upon the merits." We therefore respectfully urge that, in view of the Constitution of Michigan, that this case is no precedent for the case at bar; and it will further be noticed that the case was squarely decided upon that provision of the Michigan Constitution (p. 484 of the Opinion).

U. S. v. *Perez*, 9 Wheat., 579.

The opinion is by Mr. Justice Story rendered in 1824, and we submit, it is very much like the opinion rendered by Mr. Justice Story in the 2 Gall. It covers two pages, cites no authorities and simply holds that:

"They (judges) are to exercise a certain discretion on the subject, and it is impossible to have defined, all the circumstances which would render it proper to interfere. To be sure the power ought to be used with the greatest caution under urgent circumstances and for very plain and obvious causes. * * * But after all they have the right to order the discharge, and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges under their oaths of office."

This decision came up from the District Court of New York which was controlled by the principles and procedure and criminal law of the State of New York as

stated and held by the Supreme Court of the United States in *U. S.* v. *Reed et al.*, 12 How., 366, and subsequent cases.

In the latter case, the court said:

"The courts of the United States were in these respects (referring to criminal procedure) to be governed by the laws of the several states. It would seem necessarily to follow that the same principles were to prevail throughout the trial and that they were to be governed in like manner in the ulterior proceedings after the jury was sworn where there was no law of Congress to the contrary."

Four years prior to the rendition of this decision, the Court of Appeals of New York had decided in the case of *People* v. *Goodwin*, 18 Johnson, 187, following the statute of the State of New York, that a juror might be discharged under the conditions mentioned in the statute, and therefore the decision in the 9 Wheat., simply followed that decision in the State of New York which was based upon that statute.

Section 428 of the Criminal Code of the State of New York (which is known as "Code of Criminal Procedure of the State of New York"), 170, provides that:

"After the jury have retired to consider of their verdict they can be discharged before they shall have agreed thereon, only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or
2. When, after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or
3. When with the leave of the court the public prosecutor and the counsel for the defendant consent to such discharge."

Section 430 provides:

"In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

People v. *Goodwin*, 18 John., 187,

followed this statute and is therefore no authority against our contention. It may, however, be interesting to read the language used by the court in that opinion to be found on page 204, as follows:

"Upon full consideration, I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and obsolute necessity. * * * And in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal."

State v. *Nelson*, 26 Ind., 366.

In connection with this case should be read the case of *State* v. *Leunig*, 42 Ind., 541, in which the court holds:

"The mere ruling or finding of the court that the ends of justice require the discharge of the jury will not of itself be sufficient to establish a necessity for their discharge, especiallly when the fact in the record show that no such necessity existed. The judge might find that the ends of justice required the discharge of the jury and the continuance of the cause in order that absent witnesses might be procured or for any other cause, when in fact there was no necessity for it. We do not think it necessary in this case to re-open the discussion of the question as to when and under what circumstances the jury may be discharged without its being equivialent to a verdict of not guilty. We are satisfied that in the case at bar there

was no necessity for discharging them, and that the court permitted no error in ordering the discharge of the prisoner."

Section 1828 of the Code of Criminal Procedure for the State of Indiana provides that the jury shall retire to consider their verdict in charge of an officer who shall, when the jury have agreed upon their verdict, "return them in to court (when so agreed) or when ordered by the court."

The distinction between that statute and of Illinois is apparent.

Lawrence v. *The People*, 1 Scam. (Ill.), 414.

The opinion in that case covers nine lines and simply holds that:

"The Circuit Court may set aside a defective verdict and award a venire, *de novo*, in a criminal case where the facts found are so defective that no judgment can be rendered upon said verdict."

This was upon a writ of error, and plaintiff in error does not contend otherwise.

State v. *Woodruff*, 2 Day (Conn.), 504.

This was a prosecution before a justice of the peace on the complaint of a grand jury for unlawfully voting in a town meeting of Durham. The entire opinion by the court is to be found on page 522, and is as follows:

"By the court unanimously. The judgment was reversed on the ground that the qualification required by a statute is the having a free hold estate actually rated in the common list at $9, but that having such estate ratable in the list at that sum is not sufficient."

There was a discussion in that case as to the right to discharge a jury unable to agree, but no opinion was given upon the question here at issue.

Even assuming, however, that that opinion makes against our contention (and we deny that fact there), is no provision in the Constitution of Connecticut that a person shall not be twice placed in jeopardy for the same offense.

State v. *Brooks*, 22 Tenn., 72.

We here quote the entire opinion of the court in this case:

"The prisoner was indicted in the Circuit Court of Hardin for the crime of murder. At the October, 1841, term he was put upon trial. The jury not being able to agree the case was continued from day to day until the last day when the court remained in session when they were discharged and a mistrial directed. It appears that this was the last order made by the court during the term except one allowing a bill of costs for the jury during the trial. * * * The business of the court being finished, and the time having arrived for a term to be held at another place, and disagreeing, the jury may be discharged and a mistrial entered without discharging the prisoner. * * * We don't think this act can affect the present case, because the record shows there was another court to be held; and of the necessity of an adjournment of the court at Hardin for the purpose of so doing the Circuit Court was alone competent to determine; and because the record showed that the mistrial had to be entered, because the jury could not agree upon a verdict." (And the court had to adjourn.)

State v. *Prince*, 63 N. C., 529.

If this case makes against our contention, it is controlled in express language by the case of *State* v. *Altman*, 64 N. C., 364, wherein the court held that a jury having retired to consider their verdict upon Saturday of the first week of the term at 8 o'clock P. M., and upon Monday of the second week at half past 5 P. M., having returned in to court, being unable to agree, the judge ordered a

juror to be withdrawn and the jury discharged. The court upon this state of facts held that the prisoner was placed in jeopardy and could not be tried again for the same offense. In conclusion the Supreme Court said:

"The case was committed to the jury on Saturday evening of the first week of the term, and the jury was discharged on the evening of Monday of the second week, after a deliberation of about forty-five hours. We do not think that the mere lapse of that space of time without an agreement by the jury can be, as we may suppose it to have been (although the fact is not stated), with their declaration that they probably could not ever agree was a sufficient cause for their discharge."

We therefore submit that the great weight of authority makes for the contention that defendant has twice been placed in jeopardy.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY DIRECTING THE "WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE SAID BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

The statute under which the defendant was tried (Sec. 215 of the Criminal Code of Illinois), and which is quoted in full, *supra*, provides that if any officer duly authorized by law to receive a fund

"shall fail or refuse to pay or deliver over the same when required by law, * * * he shall be imprisoned in the penitentiary not less than one nor more than ten years, * * * provided that no person shall be com-

mitted to the penitentiary under this act unless the money not paid over shall amount to one hundred dollars. * * * "

The verdict of the jury was that,

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money, * * * and we fix the amount thereof to be $316,000, and we fix his punishment at imprisonment in the penitentiary."

The judgment of the court committing the defendant upon this verdicts directs

"the warden or keeper * * * to take the body of the said defendant, Edward S. Dreyer, and confine him in said penitentiary in safe and secure custody from and after the delivery thereof, until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." (21, 22.)

It appears from said judgment order that the defendant

"is sentenced to the penitentiary of this state, at Joliet, for the crime of failure to pay over money." * * *

It will further appear that he is to be confined in the penitentiary until

"discharged by the State Board of Pardons, * * * not exceeding the maximum term for the crime for which the said defendant was convicted and sentenced."

There is no crime defined in the Criminal Code of Illinois by the term "failure to pay over money." The section of the statute under which the defendant was indicted, tried and convicted is entitled, "Withholding Funds." The judgment order does not find the amount which the defendant has withheld and hence, under the statute last above referred to (Sec. 215), Dreyer is not

to be committed to the penitentiary at all

"unless the money not paid over shall amount to one hundred dollars, or if it appears that such failure or refusal is occasioned by unavoidable loss or accident."

Who, therefore, is to determine what is

"the maximum term for the crime for which the said defendant was convicted and sentenced."

The judgment was entered in conformity with the law approved April 21, 1899, in Illinois, entitled: "An Act to revise the law in relation to the sentence and commitment of persons convicted of crime, and providing for a a system of parole. * * *"

The pertinent paragraphs of that act are as follows:

SENTENCE TO THE PENITENTIARY—TERM OF IMPRISONMENT.

1. "That every male person over twenty years of age, and every female person over eighteen years of age, who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary, and the court imposing such sentence shall not fix the limit or duration of the same, but the term of such imprisonment shall not be less than **one year, nor shall it exceed the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time,** as now provided by law."

DUTY OF THE PENITENTIARY COMMISSIONERS TO ADOPT RULES, ETC., RECEIPT OF PRISONERS, EXAMINATION OF, BOARD OF PARDONS, REGISTER TO BE KEPT.

2. "It shall be the duty of each board of penitentiary commissioners to adopt such rules concerning all prisoners committed to their custody as shall prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. Whenever any prisoner shall be received into said penitentiary, the

warden shall cause to be entered in a register the date of such admission, the name, nativity, nationality, with such other facts as can be ascertained, of parentage, education, occupation and early social influences as seem to indicate the constitutionally and acquired defects and tendencies of the prisoner, and based upon these, an estimate of the present condition of the prisoner, and the best probable plan of treatment. And the physician of said penitentiary shall carefully examine each prisoner when received and shall enter into a register to be kept by him, the name, nationality or race, the weight, stature and family history of each prisoner, also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited. Upon the warden's register shall be entered from time to time, minutes of, observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of such prisoner, and any subsequent facts or personal history which may be brought officially to his knowledge bearing upon the question of the parole or final release of the prisoner; and it shall be the duty of the warden, or, in his absence, the deputy warden, of each penitentiary to attend each meeting of the board of pardons that is held at the penitentiary of which he is warden, for the purpose of examining prisoners as to their fitness for parole. He shall advise with said board of pardons concerning each case, and furnish said board of pardons with his opinion, in writing, as to the fitness of each prisoner for parole whose case said board may be considering. And it is hereby made the duty of every public officer to whom inquiry may be addressed by the clerk of the board of pardons, concerning any prisoner, to give said board all information possessed or accessible to him, which may throw light upon the question of the fitness of said prisoner to receive the benefits of parole."

WHEN PRSIONER SENTENCED—OFFICIAL STATEMENT OF JUDGE AND STATE'S ATTORNEY TO BE ATTACHED TO MITTIMUS.

3. "It shall be the duty of the judge before whom any prisoner is convicted, and also the state's attorney, of the county in which he is convicted, to furnish the board of penitentiary commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the commital of the crime of which he was convicted, relative to his habits, associates, disposition and reputation, and any other facts and circumstances which may tend to throw any light upon the question as to whether such prisoner is capable of again becoming a law-abiding citizen. It shall be the duty of the official reporter, at the direction of the judge of the said court or the state's attorney of said county, to write the official statements of the judge and state's attorney above referred to at the time of the conviction of the prisoner, and it shall be the duty of the clerk of the court to cause such official statements to be attached to the mittimus with the copy of the judgment of the court at the time of issuing the same, and deliver the same, so attached to the mittimus, to the sheriff of the county for transmission to the penitenitary, at the time of the delivery of the prisoner to the warden; and it shall be the duty of the warden to report to the board of pardons the receipt of such prisoner with such other official information as the board may require within five days after the receipt of such prisoner."

"4. The said **board of pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and enclosure.** *Provided*, that no prisoner shall be released from either penitentiary on parole until the state board of pardons, **or the warden of said penitentiary shall have made arrange-**

ments, or shall have satisfactory evidence, that arrangements have been made for his honorable and useful employment while upon parole, in some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the state. *And provided*, further, that all prisoners so released upon parole shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were convicted and sentenced **and subject at any time to be taken back within the enclosure of said penitentiary, and full power to enforce such rules and regulations, and to retake and reimprison any inmate so upon parole is hereby conferred upon the warden of said penitentiary**, whose order or writ certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein to authorize said officer or person to arrest and deliver to the warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers, or other persons named therein, to execute said order or writ the same as any other criminal process. **In case any prisoner so conditionally released or paroled shall flee beyond the limit of the state,** he may be returned, pursuant to the provisions of the law of this state relating to fugitives from justice. It shall be the duty of the warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the state board of pardons, giving the reasons for the return of said paroled prisoner.

Provided, further, that the state board of pardons may, in its discretion, **permit any prisoner to temporarily and conditionally depart from such penitentiary on parole and go to some county in the state named and there remain within the limits of the county and not to**

depart from the same without written authority from said board, for such length of time as the board may determine, and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law abiding citizen of industrious and temperate habits, and report to the sheriff of the county on the first day of each month, giving a particular account of his conduct during the month, and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report and to transmit such report upon blanks furnished him by the warden of the penitentiary to said warden within five days after the receipt of such prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole.

5. Upon the granting of a parole to any prisoner, the warden shall provide him with suitable clothing, ten dollars in money, which may be paid him in installments at the discretion of the warden, and shall procure transportation for him to the place of his employment, or to the county seat of the county to which he is paroled.

6. It shall be the duty of **the warden** to keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the warden, also with their employers, and when, **in his opinion any prisoner who has served not less than six months of his parole acceptably,** has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the **warden shall make certificate to that effect to the State Board of Pardons;** and whenever it shall be made to appear to the State Board of Pardons from the warden's report, or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty,

and that his final relief will not be incompatible with the welfare of society, **the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of his conviction, which said order, when approved by the governor,** shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the board of pardons to send written notice of the fact to the warden of the penitentiary of the proper district, whenever any prisoner on parole is finally released by said board."

Article 3 of the Constitution of Illinois of 1870 (Hurd's Rev. Stat. Illinois, 55), provides:

"The powers of the government of this state are divided into three distinct departments, legislative, executive and judicial; and no person or collection of persons being one of these departments shall exercise any power belonging to either of the others except as hereinafter expressly directed or permitted."

Section 1 of article 6 of the same constitution (p. 53), provides that:

"The judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, Justices of the Peace, Police Magistrates, and such courts as may be created by the law in and for cities and incorporated towns." (Hurd's Rev. Stat., 63.)

Section 13 of article 5 of the constitution provides that the pardoning power shall be in the governor of the state. (Hurd's Rev. Stat. of Ill., 61.)

The act of April 21, 1899, above quoted, is a revision of the act entitled "Parole System," which was "An Act

in relation to the sentencing of persons convicted of crime, and providing for a system of parole," approved June 15, 1895, and to be found in the Laws of Illinois of 1895, p. 115 *et seq.* The pertinent part of both of these acts, and especially the parts here complained of, as being unconstitutional, and depriving the defendant of his liberty without due process of law, are identical.

The act of 1895 has received the judicial sanction of the Supreme Court of Illinois in *George* v. *The People*, 167 Ill., 447, which case will be hereinafter more fully referred to.

THE ACT TO REVISE THE LAW IN RELATION TO THE SENTENCE AND COMMITTMENT OF PERSONS * * * PASSED APRIL 21, 1899.

The act in question first provides that the prisoner shall be sentenced to the penitentiary for no definite term, but that his term

"shall not be less than one year, and shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted, making allowance for good time, as now provided by law." (Hurd's Rev. Stat., 669.)

The judgment in question does not fix any minimum term, but only provides that the defendant "shall not be imprisoned to exceed the maximum term for the crime for which the said defendant was convicted and sentenced. (21, 22.) Assuming that the warden of the penitentiary is capable of ascertaining and determining what the punishment for the crime of failure to pay over money may be (or whether the amount so not paid over exceeds $100), as fixed by the statute, there is still no provision in the judgment order that will enable the warden to give

to the defendant the allowances provided under this law and other laws for "good time."

Under the statute creating and defining the offense of withholding money, the defendant may be guilty of a misdemeanor only (if the amount of money should be less than $100), and hence his punishment would be by imprisonment in the county jail, or fine, or both. The defendant would still be guilty of the offense created, notwithstanding the amount of money was less than $100, hence the warden must necessarily exercise a judicial power in determining, first, for what crime the defendant has been convicted, and, second, what is the maximum punishment for that crime.

The Supreme Court of the State of Illinois is committed to the doctrine that any law that grants judicial power to any person, persons or body, other than the parties designated in the constitution, is unconstitutional.

In *People ex rel. Kern* v. *Chase, supra,* 165 Ill., 527, the Supreme Court of Illinois had occasion to pass upon the constitutionality of what is known as the Torrens Law. In determining the powers of the registrar, with reference to land titles, that court said (p. 538 of opinion):

"Whether the principal thing to be determined by them be the ownership of the land, or merely whether it shall be brought under the provisions of this act, or only when the statute of limitations shall begin to run, it seems clear that the adjudication **is upon the rights of the parties claiming as owners, by construing and applying the law to the facts of the case.** The definition of judicial power given by Judge Cooley in his work on Constitutional Limitations, held by this court to be sufficiently accurate for the purposes of the question then before the court, which was, in substance, the same as that now under consideration, is as follows: '*The power which adjudicates upon and protects the rights and interests of*

individual citizens, and to that end construes and applies the laws.' (*Owners of Lands* v. *People ex rel.*, 113 Ill., 296.) We do not understand that under this definition or under any definition of the term 'judicial powers' it is necessary that the adjudication between the parties shall be conclusive of their rights put in issue: but if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, **and that adjudication infects any of the rights or interests of the parties, though not finally determining the rights, it is still a judicial proceeding or the exercise of judicial functions.** The question, therefore, in the supposed case is, not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership."

The act which is thus passed upon is to be found in the Laws of Illinois of 1895, at page 107. The conclusion of the court upon the act is that it vested judicial power in the registrar, and is, therefore, unconstitutional.

In *Hoagland* v. *Creed*, 81 Ill., 506, the court held that judicial power can only be vested, under the Constitution of Illinois, in the manner therein provided.

Section 4 of the "parol system" provides for the allowing to a prisoner

"to go upon parol outside of the penitentiary building, and enclosure, provided that no prisoner shall be released from either penitentiary on parol until the State Board of Pardons or the warden of said penitentiary shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole, in some suitable occupation. * * * And provided, further, that all prisoners, so temporarily released upon parole, shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary. * * * In case any prisoner so conditionally released or parolled shall flee beyond the

limit of the state, he may be returned pursuant to the provisions of the law of this state relating to fugitives from justice."

Section 6 of that act provides that:

"any prisoner who has served not less than six months of his parole acceptably, has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make certificate to that effect to the State Board of Pardons. And whenever it shall be made to appear to the satisfaction of the State Board of Pardons from the warden's reports or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty, and that his final release will not be incompatible with the welfare of society, the State Board of Pardons shall have the power to cause to be entered of record in its office, an order discharging such prisoner for, or on account of his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the board of pardons to send written notice of the fact to the warden of the penitentiary of the proper district, whenever any prisoner on parole is finally released by said board."

Under sections 4 and 6 it will be noticed that

1st. Any moment after the prisoner has been confined in the penitentiary and has begun to serve his sentence the State Board of Pardons may give complete liberty to such favored prisoner. Thus, in the case of extending the parole, limiting or shortening the sentence for the crime for which the prisoner is convicted and in case the parole is refused, extending the term of the prisoner not

favored beyond the term fixed for the favored prisoner convicted for the same offense under the same conditions and circumstances.

2nd. A temporary order "discharging such prisoner for or on account of his conviction" by the State Board of Pardons, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence.

Section 6 of the act above referred to does not vest the pardoning power in the State Board of Pardons and does not divest the Governor of pardoning power vested in him under the constitution. If the Governor should fail to approve the order of discharge mentioned in section 6, the effect, so far as the favored prisoner is concerned, is the same, because no matter what act might be committed by the prisoner so paroled, the board of pardons might refuse to re-take such prisoner into custody.

It cannot be seriously argued that this act does not vest any judicial authority in such board and endow it with power to inflict punishment unequally among violators of the law, contrary to due process of law as prescribed by the Constitution of the United States.

In *George* v. *People, supra,* the Supreme Court of Illinois held the law to be constitutional for the reason that the acts of the State Board of Pardons were merely ministerial. The authorities cited in support of this proposition by that court are no aid to a determination of this question. We contend that the fixing of the period of the sentence and committment of the prisoner is not a ministerial but a judicial act.

In American & English Ency. of Law, Vol. 12, p. 59, the author says:

"A judgment is the decision or *sentence* of the law, pronounced by a court or other competent tribunal in a proceeding therein."

To the same effect, see:

Blackstone's Com., Vol. 3, p, 395.
Blood v. *Bates*, 31 Vt., 150.
Co. Litt., 39 a.
Davidson v. *Smith*, 1 Biss. (U. S.), 351.
Zeigler v. *Vance*, 3 Iowa, 530.

In Amer. & Eng. Ency. of Law, Vol. 21, p. 1066, the author says:

"A sentence is the final determination of a criminal court, the conclusion of law formally pronounced by a criminal court, declaring the consequences to a defendant of the fact of guilt, confessed or ascertained by verdict."

Commonwealth v *Lockwood*, 109 Mass., 323.
Arcia v. *State*, 26 Tex. App., 193.

In *People* v. *Cummings*, 88 Mich., 249, the Supreme Court of Michigan had occasion to pass upon the constitutionality of an act containing each and every of the material provisions of the parole act here in question.

That act was entitled, and is as follows:

"An Act to provide for intermediate sentences, and disposition, management and release of criminals under such sentence.

Section 1. *The People of the State of Michigan enact*, That every sentence to state prison at Jackson, the State House of Correction and Reformatory at Ionia, and the State House of Correction and Branch of the state prison in the Upper Peninsular, of any person hereafter convicted of a crime, except of a person sentenced for life,

or a child under fifteen years of age, may be in the discretion of the court, a general sentence of imprisonment in that one of the prisons provided by law for the offense of which he is convicted. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted.

Sec. 2. Every clerk of any court by which a criminal shall be sentenced to any prison, whenever the term of such sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge a record containing a copy of the information or complaint, of any special plea, the name and residence of the judge presiding at the trial, also of the jurors and of the witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case, and of his reasons for the sentence inflicted; and such copy, statement and abstract, signed by the clerk of the court, shall be *prima facie* evidence against the convicted person in all proceedings for the relief of such person by a writ of habeas corpus or otherwise. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this act as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as a part of the court expenses. The clerk shall also, upon any conviction and sentence, forthwith transmit to the warden of the prison to which sentenced notice thereof.

Sec. 3. The Board of Control of prisons shall have power to establish rules and regulations under which prisoners sentenced under this act may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of said prison; and full

power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, by its clerk, shall be sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such order the same as in any ordinary criminal process.

"Sec. 4. The board shall make such rules and regulations for the separation and classification of prisoners sentenced under this act into different grades, with promotion and degredation, according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purposes of this act.

"Sec. 5. And it is hereby provided that when any prisoner violating the conditions of his parole or conditional release (by whatever name) is, by a formal order, entered in the board's proceedings, declared a delinquent, he shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time served; and any prisoner at large upon parole or conditional release, committing a fresh crime, and, upon conviction thereof, being sentenced anew to the prison, shall be subject to serve the several sentence after the first sentence is served or annulled, to commence from the date of the termination of the first sentence.

"Sec. 6. Nothing in this act contained shall be construed to impair the power to grant a pardon or commutation in any case."

In passing upon the validity of this law, the court said:

"It is not clear, from the reading of this statute whether the board of control is given the power of absolute discharge from imprisonment or not. If so, it would be clearly unconstitutional, as the exercise of such power

would certainly involve one of two things, and perhaps both. It would be the exercise of judicial power in determining the term of imprisonment of a citizen, or an act of grace, to wit, the bestowing of a pardon and release of a prisoner before his term of imprisonment had expired. The judicial power of this state, by the constitution, is vested in certain specified courts (section 1, art. 6), and the pardoning power is vested absolutely (p. 252) in the Governor of the state. (Section 11, art. 5.) * * *

Yet if it be considered that the only power conferred is a conditional release upon parole, still, if the prisoner keeps his parole, or, rather, if the board are of the opinion that he does, the release is in fact an absolute one. By what refinement of reasoning it can be made to appear that this is not in effect a pardon of the prisoner, is beyond my comprehension. And, in my opinion, this act also confers upon the board judicial power. The term of imprisonment is fixed by the board, and not by the court. The sentence is to confinement in the prison generally,—no term is fixed by the judge. How long that term will be rests entirely in the will of the board. It may be one day or fifteen years, as they see fit, in some cases.

"It is in the power of the Legislature to fix all punishment for crime, and to provide for a minimum and maximum punishment, and to give the courts in which the prisoners are convicted a discretion to fix a term between these limits; but it cannot be contended for a moment that this discretion can be given to any other person or persons. **To do so would imperil the liberties of the citizen by putting his punishment for wrongs** (*p. 253) **committed into the arbitrary power of unauthorized persons, without any right or remedy in the courts.** Nor can the Legislature authorize a circuit judge to delegate his power and discretion in such a case to any other person or persons than himself. Under this act the general sentence, without interference from other parties, must stand for the length of time fixed by the maximum term. The court imposing this sentence has no discretion. It may be truly said that he has a discretion in the first place as to whether he will sentence under the act or not. But this discretion is whether

he will delegate his power and authority in the premises to the board of control or not, and we are now dealing with a case where he has exercised this first discretion.

It is said that this act 'is evidently promoted by a desire to reform, as well as to punish; to make better those under sentence, as well as to protect society.' Let us see how it will work in the interest of reform, and what will be the discretion of the trial judge—the one person best calculated, from his knowledge of all the incidents and circumstances of the commission of the crime and of the character of the prisoner, to exercise a discretion in fixing the term of imprisonment. Take, for instance, a person convicted of manslaughter. The maximum penalty is imprisonment in the state prison for fifteen years, the minimum a fine not exceeding $1,000; the sentence may be one day's imprisonment, it may be a fine of one cent. If the crime appears to be somewhat of an aggravated character, and the prisoner a bad man and an old offender, the circuit judge may reason, 'There is no hope of reforming this man, so I will sentence him to ten years in state prison.' At the end of ten years the prisoner is released unconditionally. In another case the nature of the crime may be such that the circuit judge may think that the prisoner ought not to be let off with a fine, but deserves imprisonment; but there is hope for reform, and he therefore concludes to sentence him under the indeterminate law. The moment he pronounces this sentence the term of imprisonment is entirely, not only at the discretion of the board of control but at their will and pleasure. No court can review their action. They may discharge him the next day after he arrives at the prison, but, worse than this, they may keep him confined for fifteen years. If the board are honest men, the term of imprisonment depends on his behavior after he enters the prison. If they are not honest, it depends solely on their will. When the convict, in whose interest so-called humanitarians have devised this matter of indeterminate sentence for his reform, enters the prison, he becomes the servant and slave of the prison board, and no court in the country has any power to protect his rights or redress his wrongs.

Their discretion is not reviewable by the courts; it is arbitrary."

* * * * *

(p. 255.)

"But it is claimed that the pardoning power is not granted to the board of control by this statute, because there is no authority to discharge prisoners absolutely conferred upon the board. It is argued that the power granted by this act is only to permit prisoners sentenced under it to go upon parole in the legal custody and control of the board, subject at any time to be taken back within the enclosure of the prison. If this be so, what is meant by this parole, and what is the power of the board? *Can they let one man out, not to go beyond a five mile limit, another to keep within the county where the prison is located, the third to keep within the congressional district, the fourth not to go outside the state, the fifth to keep himself within the limits of certain states of the Union, the sixth not to leave the United States, and the seventh not to visit England, and the others confined to certain localities, at the will and pleasure of this board*? Or does the law contemplate that this parole shall be in fact a release from prison with only the condition that the board may bring the person on parole back again if they see fit, and make him serve his whole unexpired maximum term within the prison walls? In any event, this parole system is as obnoxious to the constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, these conditions may be made so trifling, as in fact to be no conditions at all."

* * * * *

(p. 259.) "Any convict thus released on parole can at any time be brought pack into the prison upon the written order of the board, which all officers must obey. All that is necessary is for the board to enter a formal order that the convict is a delinquent—has violated the conditions of his parole—and that is the end of it. The convict is not to have a hearing, and no court has power to interfere in his behalf, if this law is constitutional. Nor is this all, he is to be treated thereafter as an escaped

prisoner, owing service to the state, and loses the time even that he has earned by keeping the conditions of his parole perhaps for years; and if he commits another crime while he is at large upon his parole and is convicted thereof, his new sentence is deferred until he has served out his old, meting out to him double punishment for his last crime.

I have not sufficient words at my command to use in condemnation of this statute. It would fill our state with convicts—they could not be called freemen—running at large outside of our prison walls, all liable at any moment to be taken back inside at the will of four individuals, no better, probably in their impulses and caprices than the average man. These people thus at large would not only be subject to the will and pleasure of their masters, without hope of redress if wronged by them, but they would be out of prison under various conditions, and such as the board might impose upon them without regulation or restriction from any other power or authority—one under the condition that he shall drink no (p. 260) intoxicating liquor, and another that he shall not chew tobacco, and still another that he shall not use opium or drink strong coffee. There is no limit or qualification to the conditions that may be imposed."

"In looking upon this law, it is difficult to see in what respect this system of parole differs from a pardon by the Governor upon conditions. Is it not in fact a pardon—a release upon conditions? If it is not, if the faith of the board of control is not to be kept, and the convict has no certainty that if he keeps the conditions he will not be again imprisoned, then the whole scheme is a delusion and a snare, and unworthy a place upon the statute books. But, as it is, the only guaranty of a person so released of such good faith is the pleasure of the board."

* * * * *

"It is a wonder to me that such a law as this, giving such unheard of power to four men, not elected by the people, but holding their offices by appointment, could have been enacted in view of our constitution, and the whole theory of our state government, and in the light and example of the history of the establishment and growth of constitutional liberty in this country."

This court in *Medley, Petitioner*, 134 U. S., 160, clearly indicated how opposed it was to any law vesting in non-judicial officers judicial functions by discharging on *habeas corpus* a prisoner sentenced for murder, one of the grounds being that the law under which he was sentenced vested the sole power of fixing the time for execution "within one week" in the warden of the penitentiary, and commented upon that fact as follows:

"Nor can we withold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, *this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer*, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

The effect of the law in question and the power vested in the warden, board of pardons, board of prisoner inspectors, or parole board, has been passed on in *Commonwealth ex rel.* v. *Halloway*, 42 Pa. St., 446, 448, as follows:

"But a majority of us think the act is unconstitutional as interfering with judgments of the judiciary. The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. **The trial, conviction and sentencing of criminals are judicial duties, part of a judicial judgment in a criminal court record.** Can it be reserved or modified by a board of

prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From what judicial sentence may not the legislature direct 'deductions' to be made if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?"

Likewise has it been passed on at *nisi prius* in Illinois in *People, ex rel.* v. *Allen*, 19 Chicago Legal News, 176, as follows:

"Under the act in question the duration of imprisonment of the offender is not measured by the mitigation or aggravation of the circumstances surrounding the commission of the crime, **but is to be determined by the subsequent conduct of the convict—that is, whether his subsequent conduct may appeal to the humanity or arouse the resentment of his keeper.** Men in authority are not always blessed with the greatest share of humanity, and where is the human being who would always remain tractable and docile under the lash of the taskmaster?

Why should the man who breaks and enters a bakery to procure a loaf of bread to appease the hunger of his wife and little ones be subjected to the same term of punishment meted out to the burglar who breaks and enters a dwelling house in the dead of the night? The former haunted with specter of wife and children left to the cold charity of a heartless world would probably remain morose and resentful to his keeper during the full term of twenty years, while the latter would become a fawning sycophant, securing the good graces and commendation of those in authority so as to secure his release after the year of service. To so construe the law would be repugnant to humanity, would be in direct conflict with the constitution, and contrary to the spirit and genius of our institutions.

If the jury should be actuated by malice or influenced by public opinion in fixing the duration of imprisonment, the court has the power to re-examine the case and cor-

rect the abuse, so that the judicial power of the court is never surrendered to the jury. Such is not the case with respect to the warden and prison commissioners under the law in question. **The duration of the imprisonment of convicts, which, as we have seen, is a judicial power, is vested in those officials, and their action is not reviewable by any tribunal on earth.** As I am answerable to my own conscience for my official acts, I can never lend my sanction to such an inhuman, and to my mind, monstrous proposition."

Conclusion.

As hereinbefore pointed out, the defendant is convicted, sentenced and now imprisoned for a claimed technical violation of the criminal statute of Illinois for failing to pay over moneys to his successor in office, the failure being occasioned solely and entirely by circumstances beyond his reach, which moneys prior to the final conviction of the defendant had been repaid.

We respectfully submit that upon the points relied upon and under the authorities cited, the defendant is being deprived of his liberty without due process of law, in violation of the constitution of the United States and that the judgment complained of should be reversed and set aside.

Levy Mayer,
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